EDITOR'S NOTE

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NO. 90-651

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MICHAEL E. PLUNKETT , PETITIONER

AND

LANE + KNORR + PLUNKETT, ARCHITECTS AND PLANNERS; LANE + KNORR + PLUNKETT, INVESTMENT COMPANY, A/K/A/ LKP INVESTMENT COMPANY,

PLAINTIFFS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVOR OF FIRST INTERSTATE BANK OF ALASKA; FIRST INTERSTATE BANCORPORATION; FIRST INTERSTATE BANK OF OREGON,

RESPONDANTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Manhattan Beach, Cal. 90266
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OCTOBER 16, 1990.

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL E. PLUNKETT,

Plaintiff-Appellant,

and

LANE, KNORR & PLUNKETT, ARCHITECTS AND PLANNERS, LANE, KNORR & PLUNKETT INVESTMENT COMPANY, a/k/a LKPI Investment Company,

Plaintiffs-Appellants,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver of First Interstate Bank of Alaska, FIRST INTERSTATE BANK CORPORATION, FIRST INTERSTATE BANK OF OREGON,

Defendants-Appellees.

Appeal from the United States District Court for the District of Alaska H. Russel Holland, District Judge, Presiding

Submitted: May 11, 1990**
Seattle, Washington

Before: FARRIS, PREGERSON, AND FERGERSON, Circuit Judges.

Michael E. Plunkett, a pro se

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a), Circuit Rule 34-4.

plaintiff and appellant, appeals summary judgment against him. Plunkett's suit pertains to circumstances surrounding two commercial loans he obtained from the Bank of Commerce (ABC) in 1981 and 1982. Plunkett was given a rate of interest by ABC pegged to the prime rate offered by the First National Bank of Oregon (FNBO) to FNBO's most creditworthy borrowers. FNBO, subsequently renamed First Interstate Bank of Oregon (FIBO), has been at all relevant times a wholly-owned subsidiary of First Interstate Bank Corporation (FIBC). In 1983, ABC entered into a franchise agreement with FIBC and was renamed First Interstate Bank of Alaska (FIBA) (now in receivership and represented as an appellee by the Federal Deposit Insurance Corporation).

Plunkett argues that FIBA, FIBO, and FIBC conspired with other, unnamed entities to fix the rate of interest offered to commercial borrowers, causing Plunkett to pay illegally inflated rates on his loans. He further contends that FIBO's definition of "prime rate" was intended to induce the false belief among its borrowers that the prime rate was the

lowest rate FIBO offered, and that the FIBA reference to that rate was the lowest rate FIBO offered, and that the FIBA reference to that rate on his loan instruments manifested a conspiracy between the two banks (and the Oregon bank's parent, FIBO) to deceive him. These contentions formed the basis for Plunkett's federal claims under section one of the Sherman Act, 15 U.S.C. §§ 1951, 1952, and his pendent Alaska claims (statutory, breach of contract, fraud, civil conspiracy, interference with contract, interference with prospective economic advantage, intentional infliction of emotional distress, and an assortment of so-called "prima facie torts of various descriptions," including "gross negligence, recklessness, ...wrongful foreclosure, usury, tortious breach of contract and others."

The district court granted summary judgment for FIBA, FIBO, and FIBC on the ground that Plunkett presented no credible evidence that the banks engaged in any actionable conduct. As a matter of law, the court held, no trier of fact could find for Plunkett.

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. Kruso v. International Telephone & Telegraph Corp., 872 F.2d 1416, 1421 (9th Cir. 1989); State Farm Fire and Casualty Co. v. Martin, 872 F. 2d 319, 320 (9th Cir. 1989). The appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56 (c). Darring v. Kincheloe, 783 F.2d 874, 876 (9th Cir. 1989). The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Fung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir. 1989), Jugis v. Hamilton, 872 F. 2d 919, 920 (9th Cir. 1989).

DISCUSSION

Plunkett insists that he established a prima facie case and is entitled to try it. First, he points to another case, Wilcox Dev. Co. v. First Interstate Bank of Oregon, 605 F.Supp 939 (D. Or. 1985), where a jury returned a verdict against

FIBO on a Sherman Act claim. Second, he appears to rely on another part of that case in its appellate incarnation, Wilcox v. First Interstate Bank of Oregon, 815 F.2d 522 (9th Cir. 1987), where summary judgment for defendant on a RICO claim was reversed and remanded. It was alleged in the Wilcox plaintiffs' RICO claim that FIBO made false representations about its prime rate being the lowest rate given to creditworthy borrowers. Plunkett apparently infers that the issue of whether FIBO misrepresented its interest rate is therefore triable here. Third, Plunkett asserts that FIBO actually participated in loans granted by FIBA during the period of Plunkett's loans, and argues that that participation constitutes evidence of rate-fixing activity and collusion by the banks in the fraud associated with FIBA's use of FIBO's prime rate as a reference for its own loans. Finally, Plunkett argues that a former loan officer at FIBO was subsequently employed in the same capacity by FIBA, further linking the activities of the defendants with respect to rate-fixing and FIBO's misrepresentation of its prime

rate.

The district court correctly ruled that Plunkett's facts cannot withstand a summary judgment motion under Fed. R. Civ. P. 56(c), as construed by Celotex Corp. v. Catrett, 477 U.S. 317 (1986), California Architectural Building Products v. Franciscan Ceramics, 818 F.2d 1466 (9th Cir. 1987), cert. denied, 484 U.S. 1066 (1988), and Levin v. Knight, 780 F.2d 766 (9th Cir. 1986). First, as to the antitrust claim, Wilcox, 815 F.2d 522, controls. We held there that a bank does not violate the Sherman Act simply by pegging its interest rate to the interest rates of other banks. A mere showing by a plaintiff of such parallelism is not enough. Id. at 526. Plunkett has failed to demonstrate that FIBA's pegging of its rate to that of FIBO was anything but a legitimate business practice. In fact, he does not begin to approach the level of proof of unlawful concerted activity required for his antitrust claim, as the district court noted.

Second, as to the various claims deriving from Plunkett's fraudulent dilution theory, even if plausible, amounts

that FIBO and FIBC are liable for misrepresentation to Oregon borrowers, there is nothing in the record from which a trier of fact might reasonably conclude that Plunkett has a cause of action against FIBA, FIBO, and FIBC. He had no business relationship with either FIBO or FIBC and cannot demonstrate that any relationship either had with FIBA affected him. Neither the banks' business connections nor the fact that FIBA and FIBO may have employed the same loan officer at different times offers credible evidence of collusive conduct against Plunkett. The district court, it must be concluded, correctly rejected Plunkett's allegation that the banks conspired to defraud him.

Plunkett alternatively seeks to have his pendent claims dismissed without prejudice. Since all of his claims, both state and federal, are based on an allegation of conspiracy, the district court rendered summary judgment against all of them. This was certainly within the court's discretion, Schultz v. Sundberg, 759 F.2d 714, 718, (9th Cir. 1985), and, especially given the factual

paucity of appellant's case, a proper exercise of discretion, Jones v. Community Redevelopment Agency, 733 F.2d 646, 651 (9th Cir. 1984).

The district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT, LANE + KNORR + PLUNKETT, Architects and Planners, LANE + KNORR + PLUNKETT, Investment Company and all others similarly situated, Plaintiffs, vs. FIRST INTERSTATE BANK OF ALASKA, formerly Alaska Bank of Commerce, FIRST INTERSTATE BANCORP, FIRST INTERSTATE BANK OF OREGON; formerly First National Bank of Oregon, and Unknown Defendants DOES 1 through100)	NO.A84-387 Civil ORDER Summary Judgment Granted

The court has now before it a motion by defendants First Interstate Bank of Oregon (FIBO) and First Interstate Bancorp (FIBC) seeking summary judgment, judgment on the pleadings, and, alternatively, for a more definite statement. The motion is made pursuant to Rules 12(c) and 56, Federal Rules of Civil Procedure, and is made on the grounds that there are no genuine issues of material fact in dispute and that the defendants are therefore entitled to judgment as a matter of law, judgment on the pleadings, or, alternatively, a motion/order for a more

Order (Summary Judgment Granted)

definite statement. The motion is opposed by plaintiff. The court has heard oral argument.

In 1981, the plaintiff executed a note to secure a loan from the Alaska Bank of Commerce in the amount of 1.667 million at an interest rate equal to 3.5% above "the prime rate". The note defined "the prime rate" as being "the prime rate being charged by the FIRST NATIONAL BANK OF OREGON, PORTLAND, OREGON, to its most credit worth borrowers during the term of this note." On February 11, 1982, plaintiff borrowed $335,600.00 from the Alaska Bank of Commerce, upon which interest was set at the "prime rate" of FIBO.

At the time the loans were made, the Alaska Bank of Commerce had no connection with either FIBC or FIBO. FIBO, formerly known as First National Bank of Oregon, was at all pertinent times a wholly-owned subsidiary of FIBC. Neither of FIBO or FBIC was involved in the loans to the plaintiff, nor did they have knowledge of the loans. Neither FIBO nor FIBC had (or have) any participation in the loans

In February 1983, the Alaska Bank of

Commerce entered into a franchise agreement with FIBC and changed its name to First Interstate Bank of Alaska (Interstate of Alaska). The franchise agreement did not result in either FIBC or FIBO obtaining any interest in First Interstate Bank of Alaska, nor did it result in either entity becoming a participant in the loan to the plaintiff.

Rule 56(c), Federal Rules of Civil Procedure, provides in relevent part.

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The court views the evidence and the inferences therefrom in the light most favorable to the non-moving party. Levin v. Knight, 780 F.2d 786, 787 (9th Cir. 1986).

Three U.S. Supreme Court cases have clarified what a non-moving party must do to withstand a summary judgment motion. As explained by the Ninth Circuit in California Architectural Building Products, Inc. v. Franciscan Ceramics, Order (Summary Judgment Granted)

Inc., 818 F.2d 1466, 1468 (9th Cir 1987).

> First, the Court has made clear that if the non-moving party will bear the burden of proof at trial as to an element essential to its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element, then summary judgment is appropriate. See Celotex Corp. v. Catrett, [477 U.S. 317], 106 S. Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). Second, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 1477 U.S. 242] 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (emphasis added). Finally, if the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

The plaintiff's revised second amended complaint makes eleven claims for relief.

The plaintiff's first claim for relief is that the defendants committed a violation of the "Sherman Act, 15 U.S.C. § 1, et seq." The plaintiff contends that the defendants engaged in this unlawful conduct as follows: first, FIBO engaged in unlawful conduct with persons not

named as defendants, by using the "count of four" method of setting the prime rate of FIBO. Second, FIBO and Interstate of Alaska conspired to fix prices and Interstate of Alaska subsequently contracted with the plaintiff.

The "count of four" method of setting a bank's prime rate involves a bank following the lead of four other major banks. This method of setting the prime rate has been expressly held as bing non-violative of the Sherman Act. Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522, 526 (9th Cir. 1987). The plaintiff claims that Wilcox is inapplicable to the instant case because Wilcox involved a bank exercising competitivie independent business judgment.

> "[T]he fact that competitors may see proper in the excercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination."

Id. (citation omitted).

While the plaintiff's understanding of Wilcox is correct, he fails to provide the court with any facts which evidence

"any suppression of competition or show any sinister domination." Indeed, all of the plaintiff's argument in this regard amounts to pure allegation and speculation. FIBO and Interstate of Alaska had no relationship whatsoever at the time the subject loans were made. Furthermore, "[r]eliance on other banks' prime rate charges is a convenient and accurate way for [a bank] to maintain its prime rate at the level set by the national market." Id. The Ninth Circuit's decision in Wilcox is also highly instructive on the issue of a plaintiff's burden of proof in a Sherman Act case such as the case at bar. Specifically, the court in Wilcox held:

> Horizontal price fixing is illegal per se. The borrowers are not required to prove that defendants entered into an express agreement to fix prices. An agreement may be inferred from circumstantial evidence of "a common design and understanding, or a meeting of minds in an unlawful arrangement..." Nevertheless, when relying solely on circumstantial evidence, a plaintiff must present evidence from which an inference of conspiracy is more probable than an inference of independant action. The plaintiff's burden is to produce evidence "that is capable of sustaining a rational inference of conspiracy and that tends to exclude the possibility that

> the defendant acted independently of the alleged co-conspirators, and thus lawfully." Thus, antitrust law limits the range of permissible inferences from ambiguous evidence. "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."

Id. at 525 (citations omitted).

The plaintiff has failed to make a showing that there are genuine factual issues that can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. At oral argument on this matter, plaintiff argued that the mere denial of his allegations by officers of the defendant entities is not sufficient evidence to sustain their motion for summary judgment. The plaintiff fails to understand that, per California Architectural Building Products, Inc., 818 F.2d at 1468, as the non-moving party bearing the burden of proof at trial, he must make a showing sufficient to establish a genuine dispute of fact with respect to the existence elements of his case. The evidence submitted by the plaintiff simply fails to make such a showing.

The plaintiff contends that the Order (Summary Judgment Granted)

"placement of loan officers", including Robert McWhorther, a former FIBO employee, at Interstate of Alaska, supports his contention that there was a conspiracy to fix prices. This contention, along with the rest of plaintiff's arguments, does not meet the plaintiff's burden to produce evidence "that is capable of sustaining a rational inference of conspiracy and that tends to exclude the possibility that the defendant acted independently of the alleged co-conspirators, and thus lawfully." In fact, McWhorter had been fired by FIBO and had himself filed a lawsuit against FIBO alleging breach of contract and outrageous conduct and deceit. There is no genuine issue of material fact in dispute as to whether or not McWhorther was a "plant" of FIBO. The facts (as opposed to plaintiff's speculation and conjecture) are that he was not.

Furthermore, the "correspondence" relationship between the banks that plaintiff contends is further evidence of a conspiracy is completely unsupported by any of the facts before the court. There

must have been some communication regarding Oregon's prime rate; but acquiring knowledge of what that rate was and merely referencing it is not a conspiracy.

Thus, the defendants' motion for summary judgment will be granted as to the plaintiff's first claim for relief.

The plaintiff's remaining ten claims for relief all hinge on the allegation that the FIBO and FIBC conspired between themselves and/or with other entities. The plaintiff has failed to establish any conspiracy between defendants FIBC and FIBO and/or between either of those entities and the other defendants. Nor has the plaintiff made any showing whatsoever that FIBC or FIBO conspired with any other person or entity to do anything which would support any of the plaintiff's other ten claims for relief. In short, since the facts before the court do not indicate that there is any reason to believe that either FIBC or FIBO had any actionable connection whatsoever with the plaintiff, it is inevitable that summary judgment must be granted in favor

Order (Summary Judgment Granted)

of defendants FIBC and FIBO.[1]

For the foregoing reasons, the defendants' motion for summary judgment is hereby granted. Plaintiff's complaint against defendants First Interstate Bank of Oregon and First Interstate Bancorp is hereby dismissed.

[1]In light of this conclusion, the court need not address the defendants' alternative motions.

Dated at Anchorage, Alaska, this 12th day of May, 1989.

United States District Judge

cc: M. Plunkett
J. Hedland (Hedland)
J.Gorski (Hughes)

Order (Summary Judgment Granted)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT,et al., Plaintiffs, vs. FIRST INTERSTATE BANK OF ALASKA, et al., Defendants.	) No. A84-387 Civil))ORDER)(Status Conference)

A status conference was held in this case on september 19, 1988.

This case is again at issue with the filing of amended pleadings, including an answer of the Federal Deposit Insurance Corporation as receiver for First Interstate Bank of Alaska on June 23, 1988. The Court's stay on account of the involvement of the FDIC in the case has expired.

The court has pending a motion for summray judgment brought on behalf of First Interstate Bancorp and First Interstate Bank of Oregon. The parties are concerned that there is additional discovery which ought to be done as a predicate to the court's consideration of that motion. Counsel have agreed that

plaintiff will undertake such discovery as he deems necessary for purposes of the defendants' summary judgment motion. That discovery shall be completed on or before November 22, 1988. On or before December 7, 1988, plaintiff may file a supplemental opposition to defendants' motion for summary judgment. Defendants may file a supplemental reply on or before December 19, 1988.

The court and parties discussed, and it has been clearly understood, that plaintiff must accomplish any discovery which he deems necessary or appropriate to the summary judgment motion of defendants within the time provided hereinabove. It is equally clear, however, that should defendants motion for summary judgment be denied, there may be additional discovery to be undertaken, and the court will address that possibility at a subsequent date.

Defendant FDIC has indicated that it will be filing a motion for summary judgment also. That motion shall be served and filed on or before October 20, 1988, in order that it may be considered

with the other defendants' like motion.

Dated at Anchorage, Alaska, this 21 day of September, 1988.

United States District Judge

cc: M. Plunkett
J.Hedlnad (HEDLAND)
J.Gorski (HUGHES)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT,et al., Plaintiffs. vs. FIRST INTERSTATE BANK OF ALASKA, et al., Defendants.	) No. A84-387 Civil) ORDER (re Motion for Leave to Amend Complaint)

Plaintiff has again moved for leave to amend or supplement his complaint. Plaintiff urges in justification of the amendment that his complaint should be supplemented so as to take account of events which have transpired since his prior pleading was filed; and, to the extent that the proposed amended complaint would accomplish this, defendants make no opposition. Defendants do, however, oppose the filing of plaintiff's proposed pleading in a number of particulars. Defendants urge that Michael E. Plunkett, pro se, may not represent partnerships as such, that plaintiff may not claim to represent a class of persons in this action, that plaintiff may not continue to

urge a rule for unknown and unidentified defendants, and that plaintiff's allegations of a religious conspiracy are irrelevant to the case at bar.

By and large, the court has already ruled on the foregoing matters, and plaintiff would be well advised to refrain from calling on the court to make the same ruling twice absent a clear showing of changed circumstances.

The court has heretofore ruled that plaintiff, appearing pro se, may act for himself and in his capacity as a partner of certain partnerships. Plaintiff may not act as counsel for the partnerships of which he is a member, nor may he act as counsel for other partners of those partnerships. Plaintiff may represent his partnership interest alone.

This case has not been constituted a class action, and plaintiff Plunkett, appearing pro se, has not been, and in all probability would not be, permitted to act in substance as counsel for a class action.

The court has heretofore ruled that plaintiff was afforded ample opportunity

to identify additional parties. He did not do so and has still not identified any additional necessary or indispensable party to this action. Accordingly, references to "unkown defendants" (in whatever number) is inappropriate.

The court has heretofore ruled that allegations of a religious conspiracy are irrelevant to the substance of plaintiff's complaint. Plaintiff has made no showing to the contrary.

Plaintiff shal revise his proposed second amended complaint in all of the foregoing respects, after which it may be served and filed on or before December 15, 1987.

Dated at Anchorage, Alaska, this 19th day of November, 1987.

United States District Judge

cc: Michael Plunkett
J.W. Sedwick (BURR)
John Hedland (HEDLAND)

ORDER (re Motion for Leave to Amend Complaint)action,

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT, et al., Plaintiffs, vs. FIRST INTERSTATE BANK OF ALASKA, et al., Defendants.	) No. A84-387 Civil) ORDER (Motion to Amend Denied, Motion for Psychiatric Examination Denied)

Plaintiff Michael E. Plunkett has moved for leave to file an amended complaint. Presumably this motion was filed for the reason that the proposed amended complaint does not comport with the leave to amend which the court had already extended to plaintiff during the course of a status conference. At that status conference, there was discussion of whether or not there were additional defendants who should be made party to this litigation. The court specifically called upon plaintiff to do the necessary investigation and, if he deemed it appropriate, name additional defendants in an amended complaint on or before July 30, 1987. Plaintiff's proposed amended com-

plaint, filed July 30, 1987, failed to name any new defendants. Rather, plaintiff's proposed amendment would perpetuated the uncertainty which he previously expressed about additional defendants by naming one hundred unknown John Doe defendants. In light of the discussions which the court had with plaintiff and defense counsel, the proposed amendment is outrageous. Despite the court's specific instructions that plaintiff carry out the necessary investigation, and despite the fact that this case was initially filed September 10, 1984, plaintiff still contends that there are "unknown" potential defendants.

The motion to amend is denied.

Defendants have countered plaintiff's motion to amend with their own motion that the court require plaintiff to submit to a psychiatric examination. The basis for this motion is plaintiff's apparent expressed belief that a conspiracy exists between financial inscitutions such as the named defendants and religious institutions. Plaintiff's notions in this regard are, to say the least, strange. The

ORDER (Motion to Amend Denied; Motion for Psychiatric Examination Denied)

court is not convinced, however, that defendants have sufficiently shown, nor that plaintiff has sufficiently displayed on his own, behavior so bizarre and disruptive of court proceedings as to require plaintiff to submit to a psychiatric evaluation. At least for the present, the court is convinced that it can, through application of the federal discovery rules and the federal evidence rules, appropriately control these proceedings so as to restrict them to the exposition of issues relevant to plaintiff's complaint as filed.

The motion to require a psychiatric examination is denied.

DATED at Anchorage, Alaska this 16th day of September, 1987.

United States District Judge

cc: Michael Plunkett
J.W. Sedwick (BURR)
John Hedland (HEDLAND)

ORDER (Motion to Amend Denied; Motion for Psychiatric Examination Denied)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT,et al., Plaintiffs. vs. FIRST INTERSTATE BANK OF ALASKA, et al., Defendants.	No. A84-387 Civil ORDER (Motion to Amend Denied, Motion to Participate as Amicus Curiae Denied)

Plaintiff Michael E. Plunkett has moved for leave to file an amended and/or supplemental complaint herein. The motion is opposed by Defendant First Interstate Bank. Seemingly due to the somewhat unique circumstances of this case, the motion to amend has also resulted in the Court being deluged with several hundred pages of additional materials sponsored by the Anchorage School District, which Plaintiff would add as a party defendant by his amendment. The Court deems it unnecessary to consider the school district filings, and its motion to participate in this motion as and amicus party is denied.

Plaintiff Plunkett's motion to amend

must be denied even though, as the parties point out, amendments to pleadings are to be freely permitted by the Court. Rule 15, Federal Rules of Civil Procedure. In this instance, it is clear that what Plaintiff Plunkett characterizes as his ninth and tenth claims for relief are unnecessary. Perhaps understandably, the pro se plaintiff here does not appreciate, nor do his pleadings comport with, the requirements of Rule 8(a), Federal Rules of Civil Procedure which provides in pertinent part.

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief....

The allegations of the ninth and tenth claims for relief which Plaintiff would add are unnecessary. It is inappropriate that parties plead the evidence which they will produce in support of their claims.

Plaintiff Plunkett's eleventh claim for relief would add two new parties to

this case. The Ninth Circuit, however is hostile to the concept of pendent party jurisdiction. In Safeco Insurance Co. of America v. Guyton, 692 F.2d 551 (9th Cir. 1982), the court stated that:

> We have repeatedly held that pagrties may not be aded to an action absent an independent jurisdictional base for inclusion and that pendent pagrty jurisdiction will not substitute for complete diversity or a federal question.

Id. at 555.

While the proposed eleventh claim for relief is inadequately pleaded in terms of Rule *, Federal Rules of Civil Procedure, it is nonetheless apparent that Plaintiff Plunkett would assert a common law civil conspiracy cause of action against the two new parties. This is a court of limited jurisdiction, and an allegation of common law civil conspiracy does not establish an independent jurisdictional base for the aforementioned claim. No federal question is apparent and diversity jurisdiction would not exist as to the new parties.

Plaintiffs' motion to amend adding Count Eleven is denied.

ORDER (Motion to Amend denied. Motion to Participate as Amicus Curiae Denied)

DATED at Anchorage, Alaska, this 7th day of November, 1986.

United States District Judge

cc: Michael Plunkett
George Weiss
J.W. Sedwick (Burr)

ORDER (Motion to Amend denied. Motion to Participate as Amicus Curiae Denied)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL E. PLUNKETT, Plaintiff- Appellant and LANE, KNORR & PLUNKETT, ARCHITECTS AND PLANNERS; LANE, KNORR, & PLUNKETT INVESTMENT COMPANY, a/k/a/ LKP Investment Company, Plaintiffs- Appellants vs. FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver of First Interstate Bank of Alaska;; FIRST INTERSTATE BANK CORPORATION; FIRST INTERSTATE BANK OF OREGON, Defendants-Appellees.	)	Filed July 18 1990 No. 89-35500 ORDER

Before: FARRIS, PREGERSON, and FERGUSEN, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

PETITION FOR REHEARING

SUGGESTION FOR REHEARING EN BANC

INTRODUCTION

A. Petition for Rehearing

In the judgment of the Appellant, the following situations exist:

1. A material point of fact or law was overlooked in the decision.

2. An apparant conflict with another decision of the court which was not addressed in the memorandum exists.

B. Points Raised on Petition for Rehearing

1. Material Facts Overlooked.

(a) First Interstate Bank of Oregon ("FIBO") was not at all relevent times a wholly owned subsidiary of First Interstate Bancorp ("FIBC"). Court Memorandum (hereafter "CM") at page 2. FIBO was formerly First National Bank of Oregon at relevent times, particularly when the first of the two loans was

executed in December, 1980. RB, Addendum 1, page 1. CR 1, Ex. 2 page 1.

(b) That FIBO, FIBC and First Interstate Bank of Alaska, ("FIBA") did not just conspire with other unnamed banks, but acted independantly and/or conspired with each other. CM at 2. CR 80, p 4,5,6,20,22, 11-27 . (Revised Secod Amended Complaint). CR 1 (Verified Complaint), CR 10 (Verified Proposed First Amended Complaint)

(c) It was FIBA's definition of the prime rate, not FIBO's definition of the prime rate that was intended to induce the false belief among FIBA borrowers that the prime rate was the lowest rate the participating and corresponding bank, FIBO, offered. CM @ 2. CR 80,page 20, CR 1 (Verified Complaint), para. 10.

(d) That the Court overlooked the claims against FIBO, FIBC, and/or FIBA based on Alaska's Consumer Protection

Statute, AS 45.50.471 et seq., Alaska Restraint of Trade Statutes, AS 45.50.562 et seq. , Alaska Banking and Usuary Statutes, AS 06.05.280, AS 45.45.010, breach of inplied covenant of good faith and fair dealing (CR 80, p25), defamation (CR 80, p. 19). CM at 2,3. CR 80, pp. 14-27.

(e) The Court overlooked that evidence was prdoduced which showed or raised a genuine issue of material fact for trial whether the method of FIBA's pegging of the prime rate to FIBO's prime rate was a "legitimate business practice". That is, the court upheld FIBA's fraudulent definition of the FIBO prime rate as a "legitimate business practice", and held further that FIBO and FIBC knowledge of FIBA's fraudulent definition and FIBO or FIBC failure to correct the erroneous definition as not being a violation of Anti Trust or RICO statutes.

CM at 4-5.

(f). The court overlooked the fact that not all claims derive from the fraudulent collusion theory but are based on independant wrongs as well. CM at 5. CR 80, para. 42,44, 48,50, 70, 68,71,72,78 etc.

(g). The court errored in statement of fact that misrepresentation took place by FIBO and FIBC as to Oregon borrowers, where the evidence shows the opposite, that is, FIBA misrepresented to Alaska borrowers that FIBO's prime rate was the rate charged FIBO's most credit worthy borrowers. CM at 5. CR 1, (Verified Complaint) exhibit 2, page 1, CR 80, Ex. 2 page 1.

(h) The court errored in overlooking Affidavits CR 4,12,14,38,96,110, ,, verified complaint (CR 1), verified proposed amended complaint (CR 10), and other evidence (CR 1 Exhibit 2, page 1, CR

80, Exhibits 1-5, in holding nothing in the record allows for a fact finder to conclude a cause of action exists against either FIBO, FIBC and FIBA. CM at 5.

(i) The court errored in its statement that no business relationship existed between Appellant and FIBO and FIBC. CM at 5. Homan stated (CR 110) he could not remember if Plaintiffs' loans were participated by FIBO or FIBC, raising a genuine issue of fact for trial, since FIBO, FIBC, and FIBA held all the evidence and refused to release same. Further, Appellant and all others similarly situated are third party beneficiaries of any participation loan and/or franchise relationship between FIBC, FIBO and FIBA.

(j) The Court errored in its statement that no relationship between FIBO or FIBC and FIBA affected Appellant. CM at 5. The loan participation relationship caused the misrepresentation

of FIBO prime rate definition by FIBA. CR 1 (Verified Complaint). CR 110 (Affidavit of Homan). FIBO had to have loan documents on whose face the prime rate was misdefined, yet on these participation and other loans where said definition was misdefined, FIBO and FIBA did nothing.

(k) The Court errored in stating the bank's business connections did not offer credible evidence of collusive conduct against Appellant. CM at 5. CR 110 proved FIBO and FIBA participated. Wilcox, 815 F.2d 522 proved FIBO and FIBA had to meet on participation loans to discuss interest rates. CR 110 proved interest rate definition was set up for the purpose of FIBO participation.

(l) The court errored in stating all claims were based on an allegation of conspiracy, when in fact individual claims were plead. CM at 5. See item h above for reference in pleadings.

2. Material Points of Law Overlooked in the Memorandum

(a). The Court overlooked that fact the District Court did in fact dismiss the pendant claims as to FIBA without prejudice, CT at 13,14, CR 113, Memorandum, page 2 (FDIC seeks dismissal of pendant claims for refiling in state court), yet District Court errored in not specifically so stating in Judgment, sufficient to avoid Res Judicata in State Court, which occurred, Reply Brief Addendum 2. CM at 5. Court errored in not applying FRCP 42(b) which states dismissal is without prejudice on jurisdictional dismissals.

(b). The court errored in ruling that court evaluated evidence to determine no "credible" evidence existed. CM at 2, 5. See argument below.

(c). The court errored in holding the district court properly rejected

Appellant's allegation that the banks conspired to defraud him. CM at 5. As discussed above and argued below sufficient admissable evidence is of record to raise a genuine issue of material fact as to whether FIBO and FIBA conspired to overcharge Appellant and others of the class, and/or to raise a genuine issue of material fact as to whether FIBO and FIBA buried the misrepresentation after learning about same.

(d). The Court overlooked and/ or otherwise failed to address the following relief sought by Appellant.

(i) Whether the Court errored in denying Motions for Leave to Amend, including inclusion of class allegations and parties, inclusion of religious issues, Anchorage School District Defendants, other conspiracy claims, unknown defendants (Appellant Brief,

hereafter "AB" at 1-2).

(ii) Whether the entire process before the court constitutes denial of due process and/or equal protection to a pro per or other litigant, bias by the court. AB at 2.

(iii) Whether the Court acted unreasonably in granting summary judgment to FDIC prior to opposition by Plaintiff. AB at 2.

(iv) Whether Court errored in failing to give notice to Pro Per Plaintiff of substantive evidentiary changes required in opposing motions for Summary Judgment. AB at 2

(v) Other issues as outlined in Brief:

(a) That the failure of the court to give pro per Plaintiff substantive notice of changes in summary judgment opposition requirements, not spelled out in local rules be certified for appeal to

U.S. Supreme Court. AB at 48.

(b) That Judgment must be reversed for fraud upon the court by FIBA. AB at 46-47.

(c) That the court find that money is a commodity for purposes of imposing 15 U.S.C. 13 in this case. Reply Brief ("RB") at 26.

(d) That AS 45.50.471 et seq. applies to loans, is not exempt, and that summary judgment was improper for FIBA, FIBO and FIBC failed to point out no genuine issue of material fact existed. RB at 26.

(e) That A.S. 06.05.280 is not subject to the limitations of AS 45.45.010 and that summary judgment must be vacated. RB @ 26.

(e). The court overlooked the Supplemental Addendum to Appellant Brief and Reply Brief, Citation to Supplemental Authorities to Appellant Brief and Reply

Brief, and Errata to Appellant Brief and Reply Brief served on May 11, 1990 and received by the Court on May 14, 1990, while Memorandum was typed, filed, and mailed by 16 May 1990..

(f). That the court errored in stating that Appellants's facts cannot withstand a summary judgment motion. CM at 2. See argument below and above.

(g). That the court incorrectly held Wilcox v. First Interstate Bank of Oregon, 815 F.2d 522 (9th Cir. 1987) as controlling as to antitrust claims. CM at 4.

(h). The court errored in upholding the district court's holding the level of proof was inadequate. CM at 5.

(i). The court errored in upholding district court's weighing of the credibility of the evidence. CM at 2,5.

(j). The court errored in holding all allegations were based on the allegation

of conspiracy, and that therefore pendant claims could be dismissed with prejudice. Claims were independantly based as well, CR 80, para. 42, 44, 48, 50, 70, 68, 71, 72, 78 and others.

(k). The court errored in holding dismissal of pendant claims was within the district court's discretion. Court improperly relied on Schultz v. Sunberg, 759 F.2d 714, 718 (9th Cir. 1985), and Jones v. Community Redevelopment Agency, 733 F.2d 646, 651 (9th Cir. 1984), which cited United Mine Workers v. Gibbs, 383 U.S. 715, 726-727, 16 L.Ed. 2d 218, 228-229, 86 S.Ct. 1130, which specifically stated, 16 L.Ed. 2d at 228:

Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without

prejudice and left for resolution of state tribunals.

(l). The Court overlooked the evidence in holding the factual paucity was grounds for proper exercise rather than abuse of discretion, when in fact the standard of review for granting summary judgment on the pendant claims is "de novo" rather than "abuse of discretion". CM at 3,5-6.

(m). As to pendant claims, Court overlooked Alaska law which rejected prima facie case standard for resisting summary judgment. See argument below.

3. An Apparant Conflict with Another Decision of the Court Which Was Not Addresed in the Opinion.

(a). The Memorandum conflicts with Wilcox v. First Interstate Bank of Oregon, 815 F.2d 522, (9th Cir. 1987). see below.

(b) The Memorandum conflicts with McElyea v. Babbitt, 833 F.2d 196,197-198 (9th Cir. 1987) where this court ruled a verified complaint could be used to resist summary judgment. RB @ 1.

(c) The Memorandum conflicts with Jacobsen v. Filler, 790 F.2d 1362-1367 (9th Cir. 1986) in that Jacobsen ruled that notice was given of the procedural requirements by virtue of its local rule requirements, rules which do not exist in Alaska.

B. SUGGESTION FOR REHEARING EN BANC.

The following grounds exist for a rehearing en banc:

1. Consideration by the full court is necessary to secure or maintain uniformity of its decisions.

2. The proceeding involves questions of exceptional importance.

3. The memorandum directly conflicts with an existing opinion by another court

of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity.

ARGUMENT

A. PETITION FOR REHEARING.

1. Facts Overlooked.

As demonstrated above, the author of the Memorandum intentionally misstated virtually every admissable fact. Simply put, the loans in question (real estate, not commercial loans per se) were variable interest loans pegged to the prime rate (not the prime commercial rate stated in the original committment agreement) of the First National Bank of Oregon, later purchased (not merely renamed) by FIBC and renamed FIBO. The court errored in calling the loans "commercial" and errored in stating that at all relevent times FIBO was a wholly owned subsidiary of FIBC. When FIBC was purchasing First National

Bank of Oregon, the first subject loan was already in place.

Appellant argued not just that FIBO, FIBA and FIBC conspired with other unnamed banks but with each other, particularly FIBC with First National Bank of Oregon, Alaska bank of Commerce with FIBC and FIBO. Most importantly, a prima facie case was made that Alaska Bank of Commerce conspired with First National Bank of Oregon and later with First Interstate Bank of Oregon to misrepresent the prime rate to its Alaska borrowers by misdefining the prime rate as the rate FIBO charged its most credit worthy borrowers during the term of the note. Further, assuming FIBA's definition of the prime rate was an innocent mistake, FIBO did nothing once it had loan documents in hand with said definition on it to have FIBA renegotiate said prime rate to correct said misrepresentation. FIBO did

nothing even when FIBA negotiated a second note with Appellant with the same definition upon it (presumably). Court also misstates that FIBA, FIBO and FIBC conspired with others to fix the rate of interest charged to "commercial" borrowers. Not so. The word "commercial" is not used by Appellant. See CR 1 (Verified Complaint), CR 80 .

Court mistates that FIBO misdefined its prime rate when clearly the evidence shows the misstatement was accomplished by FIBA. Memorandum intentionally completely misrepresesnts the facts, ostensibly to lay the groundwork to support its affirmation of the District Court.

The Court ignored other admissable facts providing prima facie evidence of coercion, extortion, breach of implied covenant of good faith and fair dealing, defamation, breach of contract, wire

fraud, mail fraud, etc..

Argument Regarding Discussion

Appellant relies on Wilcox, 815 F.2d 522, (9th Cir. 1987) to demonstrate Appellant is entitled to trial on RICO claims. That FIBO was alleged to have also misrepresented its prime rate as the rate charged its ~~most credit~~ worthy borrowers is also germane, but not the important issue as to Wilcox.

The Court holds the evidence does not meet the standards of Celotex Corp. v. Catrett, 477 U.S. 317 (1986), California Architectural Building Products v. Franciscan Ceramics, 818 F.2d 1466 (9th Cir. 1987), Levin v. Knight, 780 F.2d 786 (9th Cir. 1986), yet ignores the fact the state of Alaska in Moffat v. Brown, 751 P.2d 939, (Ak. 1988), rejected the prima facie cse standard. Thus even if Federal claims fail (which is denied), pendant claims must not as genuine issues have

been raised sufficient to meet the Alaska standard. Federal Courts are bound to apply state law to pendant claims. United Mine Workers v. Gibbs, 16 L.ed. 2d at 228, 383 U.S at 726, citing Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L.ed. 1188, 58 S.Ct. 817, 114 ALR 1487. As to Levin v. Knight, the court misapplied said case, which reversed a summary judgment deals exclusively with the satute of frauds, not an issue in this appeal.

That Wilcox controls as to Antitrust claims is a misstatement of the facts. FIBA did not merely peg its prime interest rate to that of FIBO. It misdefined FIBO'S interest rate on the face of many real estate loan forms, sent the loan forms to FIBO for participation. FIBO did nothing to correct the misrepresented prime rate on said standardized loan forms. By FIBO's admission in Wilcox, FIBO had to meet with FIBA on participation loans to discuss,

among other things, interest rates. 815 F.2d at 527 and n. 4! The Court stating that said practice of falsifying interest rate definitions was legitimate business practice by FIBA and not making any effort to correct same by FIBO or FIBC as also legitimate business practice is for the court to aid and abet fraudulent misrepresentation, collusion to commit fraudulent misrepresentation, aiding and abetting a conspiracy in restraint of trade. By so doing, the court in effect becomes an accessory after the fact to these felonious, criminal and wrongful acts.

Having now misconstrued virtually all the relevent admissable facts, the court then states Appellant does not begin to approach the level of proof of unlawful concerted activity, when in fact a prima facie case was set out for both per se and rule of reason standards(assuming but not

conceding the prima facie case must be met). Further, one need not, even to meet the prima facie case standard, meet the trial level of proof, but only raise genuine issues of material fact as to an essential element of Appellant's case. Since Plaintiff, Appellant has raised genuine issue sufficient to infer the existence of a conspiracy between FIBA and FIBO, and FIBA and FIBC, and FIBO and FIBC and First National Bank of Oregon and FIBC, FIBA and other local banks in denial of loans to Plaintiff/ Appellant, as well as overt acts in furtherance of each said conspiracy, and injury as a result, summary judgment must be denied.

Having now made a totally false misstatement, the Court proceeds to elaborate on same. On page 5, the Court assumes, "arguendo" that FIBO ,misrepresented its prime rate to its borrowers rather than he actual condition

of FIBA misrepresenting FIBO's prime rate to FIBA's Alaska borrowers and proceeds compound the error. First, Appellant's claims do not wholly derive from collusion, and do not rely on said collusion for their existence, particularly in the Consumer Protection Statute violations by FIBO (AS 45.45.471 et seq.) and the breach of implied covenant of good faith and fair dealing, defamation, etc.. See references to separate claims above.

Memorandum next states nothing in the record exists from which a trier of fact might reasonably conclude that Appellant (Appellant represents his parnership interests as well) has a cause of action against FIBO, FIBC and FIBO. From the record, Appellant certainly has a cause of action against FIBO, FIBA, and/or FIBC.

The court next falsely states that

Appellant cannot demonstrate that any relationship FIBO or FIBC had with FIBA affected Appellant. Absolutely untrue. The participation relationship in which the falsified prime rate definition was allowed to slide once First National Bank of Oregon and later FIBO knew about it (when the first potential participation loan document was received from Alaska Bank of Commerce) caused enormous injury to Appellant, CR 1,

Next, the Court errored in weighing the evidence, citing lack of credible evidence that the relationship between FIBO, FIBC and/or FIBA offers credible evidence of collusive conduct against Plunkett. This court has repeatedly held that the District Court or Appellate Court on review shall not weigh the evidence but review same in light most favorable to nonmoving party. CM at 2, AB at 18.

As to pendant claims there are at

least three errors. First, Court used abuse of discretion standard to review granting of summary judgment on pendant summary judgment rather than de novo review. CM at 5-6. Next, pendant claims as to First Interstate Bank of Alaska were dismissed without prejudice, Transcript at 13,15, FRCP 42(b) CR 113, Memorandum, page 2,, as affirmed by the Court, but FDIC now claims both here and in Alaska Superior Court case 3AN-87-9269 that adjudication was accomplished on the merits and summary judgment was granted with dismissal being with prejudice. RB at 2, Addendum 2. This Court failed to address the issue as to whether the District Court errored in its transformation of a dismissal without prejudice to an adjudication on the merits. The third and most important error is the Court's presumption that all pendant claims, both aginst FIBO and FIBC and against FIBA are based on an

allegation of conspiracy. This presumption is absolutely false. Even FDIC, FIBO and FIBC concede claims independant of collusion exist. CR 85, Memorandum. Virtually all pendant claims are individually based. Therefore, the very premise upon which the disriot court granted summary judgment as to FIBO and FIBC is erroneous. As this court improperly concluded said basis was also the reason the district court granted summary judgment as to FIBA, it compounded the error even further.

Finally, what is paucious is the Memorandum author's attention to the admissable evidence, not the paucity of the factual case itself. This case represents a culmination of a nationwide pattern of felonious conduct by scores of banks, and the aiding and abetting of misrepresented prime rates by various courts throughout the land.

Argument as to Suggestion for Rehearing En Banc

1. Consideration by the full court is necessary to secure or maintain uniformity of its decisions.

Since Wilcox, 815 F.2d at 528-532 clearly remanded case allowing RICO claims to go forward, and as Memorandum failed to address Motions to Amend and Class Issues, (class issues were allowed to go forward in Wilcox, at least as to RICO claims), to maintain uniformity, and thereby not deny Appellant equal protection under the law, a rehearing en banc on the Motion to Amend and RICO issues must be granted. Further, the Wilcox case antitrust decisions were based on "mere" parallelism, whereas the instant case relies on participation between the two banks who collude to misdefine the prime rate together, or alternatively FIBO allows FIBA to contiue

its misrepresentation with full knowledge of the fraud. The other different element is the group boycott of Appellant by other Alaska Banks both before the loans were made (but after contact was made with Alaska Bank of Commerce) and after FIBA called the loans. To secure consistency with Wilcox, rehearing en banc must be granted as Wilcox is clearly not controlling as the Memorandum states.

2. The proceeding involves questions of exceptional importance.

FIBA counsel claimed at least 15 lawyers approached him about the rate definition fraud. This would be Alaska borrowers. What is horrifying however is the degree to which various courts would stoop to uphold decisions against borrowers on the fraudulent definition and discounting claims thoughout the nation. Although some cases were settled

favorably, see Citation of Supplemental Authorities of May 10, 1990 by Appellant, many opinions dismissed the claims, particularly on fixed rate cases pegged to the prime rate, as opposed to variable rate cases like the instant loans. One case was denied because the attorney had an oversized Appendix (3000 pages). NCNB National Bank of North Carolina v. Tiller, 814 F.2d 931 (4th cir. 1987)(no pun intended).

The other exceptionally important issue is equal protection under the law. The rule 56 requirements for resisting summary judgment must be recodified so that a new lawyer, and a pro se litigant, may have the benefit of clear English requirments that (i) a cause of action consists of essential elements (ii) to resist summary judgment an opponent must submit admissable evidence that creates a genuine issue of material fact as to at

least one essential element for each cause of action for which summary judgment is sought and for which movant has pointed out no genuine issue exists.

3. The memorandum directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity.

Memorandum conflicts with Jaxon v. Circle K Corp, 773 F.2d 1138,1139-1140 (10 Cir. 1985) in that it upholds the district Courts' failure to disclose the more stringent requirements of Celotex, Anderson, Mitsushida, and California cases. This Court's decision in Jacobsen v. Filler 790 F.2d 1362, 1363-1367 (9th Cir. 1986) is in conflict with Jaxon v. Circle K Corp, 773 F.2d 1138,1140(10th Cir. 1985) and therefore a national issue

regarding rule 56 exists. Said issue is whether (1) the rule must be rewritten or local rules adopted clarifying the result of the recent Supreme Court Opinions, and/or (2) whether non prisoner, pro se litigants are entitled to "special consideration" such as procedural and/or substantive aid in describing the requirements necessary to resist a summary judgment motion. The 10th circuit has clearly stated that such aid is to be given, citing Garaux v. Pulley, 739 F.2d 437,439 (9th Cir. 1984) while this circuit has clearly stated to the contr[illegible] least as to substantive aid. It [illegible] nothing else, as to the instant case [illegible] as to whether procedural aid is also to be denied, particularly with respect to recent changes in the law such as Celotex. For these reasons a rehearing en banc must be granted.

Conclusion

The rush to judgment in this appeal was so accelerated, presumably so the Court would not have to deal with the supplemental authority, time did not permit investigation of decisions reached since case was submitted. a granting of rehearing en banc would at least give reasonable time to investigate same. Further time did not permit research of 9th circuit opinions 88-2540, and 4th circuit opinion 88-2521 either of which may present a basis for rehearing or rehearing en banc.

Dated at Manhattan Beach, California this 30th day of May, 1990.

_____

Michael E. Plunkett, pro se

Facsimile: Retyped from Original

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Attorneys for Federal Deposit Insurance Corporation

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT, et al Plaintiff, vs. FIRST INTERSTATE BANK OF ALASKA, et al., Defendants.	)	No. A84-387

FINAL JUDGMENT

This court having granted motions for summary judgment in favor of the defendants,

IT IS HEREBY ORDERED AND ADJUDGED that plaintiffs' complaint against defendants, First Interstate Bank of Oregon, First Interstae Bancorp, and FDIC, receiver of First Interstate Bank of Alaska, is hereby dismissed.

Facsimile:: Retyped from Original

Dated at Anchorage, Alaska, this 16 day of June, 1989.

/s/_____

U.S.DISTRICT COURT JUDGE

cc. O&J 3571
M. Plunkett
J. Hedland (HEDLAND)
J. Gorski (HUGHES)

7585n

Michael E. Plunkett, Pro Se
600 Barrow, Suite 600
Anchorage, Alaska 99501
(907) 277-5481

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Michael E. Plunkett, et al	)
Plaintiffs.	)
v.	)
First Interstate Bank of Alaska, formerly, Alaska Bank of Commerce, et al,	)
Defendants	)

CASE NO. A 84-387 Civil

AFFIDAVIT OF CHARLES HOMAN

STATE OF ALASKA)
) s.s.
THIRD JUDICIAL DISTRICT)

Charles Homan, being duly sworn, deposes and states:

1. I am Charles Homan, have personal knowledge of the following facts, am competent to testify as to the following facts, and if called upon to testify at a hearing or at trial would testify as follows:

2. I was Vice President of Alaska

Bank of Commerce in Anchorage, Alaska, during the period in which Lane + Knorr + Plunkett Investment Company, an Alaska General Partnership consisting of Michael Edward Plunkett, and Donald R. Knorr applied for and obtained interim financing for the construction of an Office-Condominium complex known as the 600 Barrow Building located on Block 110, Lot 1, of the Original Townsite of Anchorage, Alaska.

3. During the time in which Lane + Knorr + Plunkett Investment Company was applying for and secured interim financing for the 600 Barrow Project I was the Commercial Loan Officer at Alaska Bank of Commerce most familiar with the project and the loans.

4. I was employed as Vice President of Alaska Bank of Commerce when it changed its name to First Interstate Bank of Alaska in 1983.

5. I left employment of First

Interstate Bank of Alaska in February, 1984.

6. Lane + Knorr + Plunkett Investment Company executed two interim finance agreements entitled "Deed of Trust Note" with Alaska Bank of Commerce. The First Deed of Trust Note was in the loan amount of $1,667,200, and was originally due and payable on June 15, 1981. A copy is attached hereto as Exhibit 1, The second Deed of Trust Note was in the amount of $355,600.00 and was executed on February 11, 1982. A copy of the Second Deed of Trust Note is attached hereto as Exhibit 2.

7. Exhibits 1 and 2 hereto were standard Deed of Trust Note forms used by Alaska Bank of Commerce. The forms used in the preparation of Exhibit 1 and 2 hereto. Exhibits 1 and 2 hereto were prepared for signature by Lane + Knorr + Plunkett Investment Company under my supervision.

9. I executed loan documents on

behalf of Alaska Bank of Commerce in conjunction with the loans secured by the Deed of Trust Notes contained in Exhibits 1 and 2 hereto and was authorized to do so by the Board of Directors of Alaska Bank of Commerce.

7. Both Exhibit 1 and Exhibit 2 based the rate of interest to be charged on three and one half points above the prime rate charged by the First National Bank of Oregon, subsequently called the First Interstate Bank of Oregon. The "prime rate" was defined in the Deed of Trust Notes as "the rate being charged by the FIRST NATIONAL BANK OF OREGON, PORTLAND, OREGON to its most credit - worthy borrowers during the term of this note. The Deed of Trust Notes were set up in this fashion so that if First Interstate Bank of Oregon, formerly First National Bank of Oregon, were to participate with Alaska Bank of Commerce in any of many commercial interim finance loans being

made during the 1980-1982 period, the interest rates would correspond with the published prime rate of First National Bank of Oregon, now First Interstate Bank of Oregon.

8. During the 1980 through 1984 period Alaska Bank of Commerce (later called First Interstate Bank of Alaska) participated with First Interstate Bank of Oregon, formerly First National Bank of Oregon in many interim finance loans. I have no specific recollection whether Exhibits 1 and 2 hereto were loans in which First National Bank of Oregon and/or First Interstate Bank of Oregon participated with Alaska Bank of Commerce, (later called First Interstate Bank of Alaska).

7. While still employed by First Interstate Bank of Alaska, I learned that a consumer group had brought a class action suit against First Interstate Bank of Oregon claiming that First Interstate

Bank of Oregon had discounted loans below their published prime interest rate.

FURTHER YOUR AFFIANT SAYETH NAUGHT

_____
Charles Homan

Subscribed and sworn to before me this ___day of September, 1988.

_____
Notary Public for Alaska
My Commission Expires_____

Certificate of Service
I hereby certify that on ___ September, 1988 I caused to be hand delivered a copy of the above Affidavit with Exhibits to the offices of John Hedlund and James Gorski, counsel of record in this case.

_____
Michael E. Plunkett, Pro Se

Michael E. Plunkett, Pro Se
600 Barrow, Suite 600
Anchorage, Alaska 99501
(907) 2775481

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

Michael E. Plunkett: Lane + Knorr + Plunkett, Architect and Planners: Lane + Knorr + Plunkett Investment Company: Plaintiffs v. First Interstate Bank of Alaska, formerly, Alaska Bank of Commerce: First Interstate Bancorp; First Interstate Bank of Oregon, formerly First National Bank of Oregon; Defendants.	)	No.A84-387 Civil

AFFIDAVIT OF MICHAEL E. PLUNKETT OPPOSITION TO MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS FIRST INTERSTATE BANK OF OREGON AND FIRST INTERSTATE BANCORP MOTION FOR CONTINUANCE: MOTION TO STRIKE AFFIDAVITS

STATE OF ALASKA)
) s.s.
THIRD JUDICIAL DISTRICT)

Michael E. Plunkett, being duly sworn, deposes and states:

1. I am Michael Edward Plunkett, am a plaintiff in this action, am owner of Lane + Knorr + Plunkett, Architects and Planners, also Plaintiffs in this action.

2. I have personal knowledge of the following facts, am competent to testify as to them, and if called upon to testify at trial or hearing would testify as follows:

3. The first information I ever received that First National Bank of Oregon was not a participant in the loans which are the subject of this litigation was when I read the Affidavits submitted with the Motion for Summary Judgment on March 30, 1988. It was indicated to me at the time we signed the loans that First National Bank of Oregon, later First Interstate Bank of Oregon was the basis of the prime rate determination because said bank was to be or was the corresponding bank on the loan. The pegging of the prime rate to the First National Bank of Oregon was also a condition of the Committment letter of May, 1980, a certified true and correct copy which is included as Exhibit 2, pages 35-42.

4. I hereby certify that Exhibits 1-5 attached to the complaint are true and correct copies of the various

correspondance and loan documents executed by Plaintiffs in this case. As late as October 16, 1982 the second loan was extended, with the interest rate pegged to the prime rate of First Interstate Bank of Oregon.

5. I hereby certify that a continuance is needed due to the stay granted to First Interstate Bank of Alaska as succeeded by Federal Deposit Insurance Corporation. Plaintiff cannot conduct discovery against First Interstate Bank of Alaska until the Revised Second Amended Compiaint is answered by FIBA employees like Chuck Homan or R.J. Miller, without the documentation to refresh their memories would be a waste of time, particularly since the interest pegging decision had to be made prior to May 1980. I further certify that I am financially unable to conduct discovery in Oregon or to even pay the costs for copies of the transcripts from the Court cases held in Oregon. Further, from the affidavits of FIBO employees, it is clear that they do not recollect, at least without documentary evidence or other depositions to help

them, any dealings at all with Alaska Bank of Commerce or FIBA. Thus requests for admission, interrogatories. and/or requests for production of these unstayed defendants would be of little value. However, I certify that a continuance is necessary to the extent the motion for summary judgment cannot be denied outright so that at least paper discovery of FIBC and FIBC can be made. Interrogatories will at least theoretically require the parties to conduct some investigation of records. Unfortunately, records may have vanished, and any decision regarding how the prime rate definition was generated may rest only in the minds of the one or two individuals who made the decision.

6. I have reviewed the affidavits of Moving Party and hereby certify that sufficient hostility exists between FIBA employees, former, particularly Robert McWhorter, Frank Kauffman, Albert Swallin, Charles Homan and others that I could not obtain an affidavit voluntarily from them, and even if I could their recollections would be so vague without some refreshment

by documentary evidence that the affidavits would be insufficient to resist the motion, that is to provide more genuine issues of material fact.

7. In 1979 I was led to believe by a Alaska Bank of Commerce Officer Johnson that financing had been obtained for our building through Oregon Trails Savings and Loan. Later this statement was repudiated by others at ABC. Oregon Trails was to be a participant and the prime rate was to be based on the Oregon Trails Prime Rate. When later, after Plaintiffs litterally handed the takeout financing for the project to Homan from Alaska Small Business Loan Progaram, the committment letter had the First National Bank of Oregon listed as the basis for the prime rate.

9. When in early 1983 I learned of the franchise with FIBC, and had known of the buyout of First National Bank of Oregon. I was not surprised when Bob McWhorter became in charge of commercial loans. since I learned he had been with FIBO in Oregon, Eugene I think I learned. Kauffman had come aboard earlier, and

after McWhorter took over things deteriorated. It was my analysis that McWhorter was either reporting to or looking out for the interests of the parent, FIBC, or the participant, FIBO. Things immediately souredwith FIBA and Plaintiff. FIBA started obtaining certificates of deposit from the Anchorage School District in large amounts like $25,00,000 in a give month. At the same time credit was denied Plaintiffs, with McWhorter stating we were on an increasing spiral of debt or words to that effect. This was immediately after Plaintiff was terminated from its services on the Gruening Junior High School Project by ASD.

10. Plaintiffs incorporate all affidavits on file in this case as if fully set forth herein.

11. I certify further discovery is needed to determine the amount and style of interaction, if any between First Interstate of Oregon and First Interstate Bancorp and First Interstate of Alaska. This is especially true due to the fact

that to continue to obtain funds from ASD, FIBA may have had to accede to the demands of ASD, such as squeezing Plaintiffs. This would benefit not just FIBA but the franchisor FIBC particularily if the franchise was on a percentage basis, and FIBO if they were participating with FIBA on any loans, of any kind, or FIBA was participating in some other way.

12. We were charged in excess of $55,000 in loan fees on the first interim loan alone. No architects or engineers were ever retained to visit the site or review the design. This amount is either as a result of the risk incurred, or the fact that a portion of the loan fee went to a participant.

12. I first learned of the antitrust litigation in May 1984 when I read the article in the newspaper about the outcome of the trial. I had remembered that our loans were based on the prime rate of FIBO and called to find out what was going on.

13. In 1984, to attempt to avoid foreclosure, Plaintiffs submitted loan packages to every bank in town. Each one denied credit to Plaintiff for various

reasons. The banks were uniformly vague about the reasons except a few, such as Mike Van at Alaska Continental Bank who specifically stated that the lawsuit with ASD would have to go away before any money would be lent. National Bank of Alaska was the funniest. Jan Sieberts signalled the loan officer in my presence. Thereafter I was put off by Mr. Struts (Sp?) and finally denied credit. Alaska State Bank strung us along for several months before before turning us down. Clearly all had communicated with FIBA. FIBA had supposedly related to Rogers and Babler or MAPCO Alaska Inc. employees as early as 1982 the false hood that Plaintiffs were nearly bankrupt. Alaska State Bank is the only Alaska bank to which I have first hand knowledge that they discounted below their prime rate. I never found out how they defined their prime rate however. They discounted on point below prime to the City of Unalaska on a School and Swimming Pool interim loan for which plaintiffs were the architects. I also learned from Mood's Industrial File

that Don Mellish, former Chairman of the Board of National Bank of Alaska was a Board Member of Mapco Inc. parent of MAPCO Alaska Inc. during this period.

15. During the course of the troubles with FIBA, they notarized a Uniform Commercial Code filing signature by myself by affixing a notary that had not even been issued at the time the signature was affixed. This was reported to the Alaska State Troopers who claimed it was a civil matter.

16. Each Month we received a loan statement through the mail with the interim finance interest rate for that month printed on it. That rate, after telephoning FIBO was always 3.5 points above the prime rate given us by FIBO for the particular month. Thus, as the prime rate had been admittedly discounted, said prime rate cannot be the prime rate charged FIBO's most credit worthy borrowers.

17. I learned from counsel for plaintiffs in Wilcox case that FIBO had made some loans at a rate as low as 6%. This could have been 7 to 8 points below

the prime rate or more during the time that the loans were in place since the prime rate was as big as 21% at one point.

18. While designing a branch bank for FIBA on the layout FIBC wanted, signage, and other features. FIBC clearly was involved with the design and had decision making control over it to an unknown amount.

FURTHER YOUR AFFIANT SAYETH NAUGHT

Michael E. Plunkett

Subscribed to and sworn before me this 25 day of April 1989.

Notary Public for Alaska
My Commission Expires____

3

MICHAEL E. PLUNKETT, PRO SE
600 Barrow, Suite 200
Anchorage, Alaska 99501
(909)276-4939

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT, et al)
Plaintiffs.)
)
vs.)
)
FIRST INTERSTATE BANK OF ALASKA, formerly Alaska Bank of Commerce, et al.)
)
Defendants.)

CASE NO. A84-387 Civil

STATE OF ALASKA)
)ss
THIRD JUDICIAL DISTRICT)

AFFIDAVIT OF MICHAEL E. PLUNKETT

1. I am Michael E. Plunkett and am a Plaintiff in this case and am representing myself and my interest in Lane + Knorr + Plunkett, a partnership in which I have 65% interest and Lane Knorr Plunkett Investments.

2. I am competent to testify as to the verity, and I have personal knowledge of the following facts and if called upon to testify under oath would testify as follows:

3. I first read of the jury decision in U.S. Oregon District Court, Case NO.

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81-1127-RE, in spring of 1984, May 16, 1984 Anchorage Times.

4. On the day the article appeared, in the late afternoon, Rosita Worl (who is known as my sister-in-law but is actually a cousin of my wife but they were raised in the same home as sisters), called me and wanted to go out on the town right away at 5:00 P.M. This was unusual in that (1) such social arrangements were always made with my wife, and (2) she knew I usually worked late.

5. Rosita Worl's good friend and attorney was Ralph Duerre, partner in Burr, Pease & Kurtz, attorneys for First Interstate Bank Corporation. Ralph had billed time to First Interstate Bank on our problems with said bank and had reviewed a partnership agreement amendment for Roland Lane, former partner in Lane + Knorr + Plunkett Architects in early 1983.

6. So unusual was Rosita Worl's contact in #4 above that (1) when I read the newspaper the next day (a day late) and saw the article on the jury verdict on the Oregon Case, I was fully convinced at the time that Ralph had asked Rosita to

divert our attention on that date in the hopes we would miss the article. I was the only one who would have linked our loan with First National Bank of Oregon. I actually had to look up the note (Exhibit 2, Page 1 to Complaint) to confirm the same bank in Oregon was a defendant in the newspaper article. So upset was I by this tactic and by other tactics used by Burr, Pease & Kurtz, I had actually considered naming them in this action. But for Weiss' not wanting to do so, as a condition of taking the case, I may well have done so.

7. At that time Lane + Knorr + Plunkett Investments and Lane + Knorr + Plunkett was representd by D. John McKay of Middleton, Timme, and McKay. Subsequent to reading about the verdict in Oregon, I contacted attorney, Henry Carey, and I talked to one of his associates about the outcome of the case. I asked if they would be interested in representing us against First Interstate, et al in Alaska. I was told I would have to talk to Mr. Carey. Mr Carey was extremely difficult to get ahold of. When I finally got a

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hold of him and I explained the situation regarding imminent foreclosure, he said I should fire my attorney and sue him for malpractice for his failure to forestall sale.

8. In the time trying to talk to Mr. Carey and to find out about the case, I contacted Copeland and Landrye because I had met the local attorney, Wolf, and knew they had a Portland office. I requested copies of relevant documents from the Court regarding the case. A month or so later, on July 25, 1984, all I received was a copy of Exhibit One to the Complaint, and a copy of a previously published RICO opinion referenced on Exhibit One, along with a bill for $100.00. This was, in a word, disappointing and I got the distinct impression I was being put off and/or stalled.

9. Jerry Kurtz of Burr, Pease & Kurtz and Commercial Loan Officer, was threatening all kinds of action and I brought up the fact I knew about the Oregon Case. Kurtz got defensive and claimed some 15 others had brought up the

same issue, all for naught. As I recall, he did, however, offer to restructure the loan, cancel the foreclosure in exchange for abandoning all claims or interest overcharge, etc.

10. There was no question Kurtz was trying to belittle the interest overcharge claims but at the same time was trying to avoid us filing a claim against FIBA, FIBO or FIBC.

11. As a result of the intensity of Case 3AN-83-4318 (claims regarding the Gruening School), and the costs of retaining counsel, McKay, having to joust with insurance counsel and dissatisfaction therefrom, I began to advertise for a staff attorney. I interviewed three respondants. Weiss was the only one interested. After being retained or shortly before he came by one Saturday to discuss the case, he had on a three piece suit. When asked about his dress, he said he had to meet someone at the jail. I thought it unusual dress for going to the jail. I believe now he was going to meet with counsel for FIBA or gave the appearance of same.

12. I had discussed having Carey represent us against First Interstate. He wanted to associate with someone local. He suggested Ron Bliss and someone from Landrye, (Paragrapjh 8 above), I was opposed to that. Bliss would not accept due to a presumed conflict with his client in Case 3AN-83-4318 above.

13. After relating my conversation with Carey about firing McKay to McKay, I stated I wanted him to get the foreclosure put off, or I would have to find someone else. I suggested he talk to Carey. He did. He related Carey apologized profusely. When I next contacted Carey said he was not providing representation. I did ask him to send relevant court documents like the jury verdict, etc. All I got after paying $300.00 was a copy of some of the jury instructions, and amended complaint. Again, I was convinced I was being put off, this time by Carey.

MICHAEL E. PLUNKETT, PRO SE
600 Barrow, Suite 200
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(909)276-4939

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT, et al
Plaintiffs.

vs.

FIRST INTERSTATE BANK OF ALASKA, formerly Alaska Bank of Commerce, et al.

Defendants.

CASE NO. A84-387 Civil

ERRATA TO MICHAEL E. PLUNKETT'S AFFIDAVIT

Please substitute Exhibit "G" Page 1, and 2 for Exhibit "D" included in Affidavit of Michael E. Plunkett dated October 11, 1985.

Please substitute Exhibit "H" for a new Exhibit "H" (attached hereto), included with Affidavit of Michael E. Plunkett dated October 11, 1985.

Delete Exhibit 2 from said document.

Respectfully submitted this 15th day of October, 1985 at Anchorage, Alaska.

Michael E. Plunkett, Pro Se

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MICHAEL E. PLUNKETT, PRO SE
600 Barrow, Suite 200
Anchorage, Alaska 99501
(909)276-4939

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT,
Plaintiffs.

vs.

FIRST INTERSTATE BANK OF ALASKA, formerly Alaska Bank of Commerce, et al.

Defendants.

STATE OF ALASKA)
)
THIRD JUDICIAL)
DISTRICT)

CASE NO. A84-387 Civil

AFFIDAVIT OF MICHAEL E. PLUNKETT

1. I am Michael E. Plunkett and am a Plaintiff in [illegible] Anchorage and have control of LKP Investment Company and Lane Porr + Plunkett Architects and Planners (65%).

2. I have personal knowledge of the following facts and competent to testify as to them and if called upon to testify would testify as to the following.

3. I am representing myself and my own interest in this action.

4. On February 11, 198 I executed as partner in LKP Investments a Deed of Trust filed at Book 703 at Page 292 in the Anchorage Recording District, Third Judicial District. On September 12, 1984

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First Interstate sold at auction two parcels of real property to satisfy said obligation. The instant lawsuit was filed and a motion for Temporary Restraining Order was denied to enjoin the sale. The sale and auction too. place and the equity loss arising therefrom to plaintiffs was included in my Affidavit of September 10, 1984 which listed an equity loss of $74,000.

5. As a direct result of this equity loss and the cash loss arising from the overcharged interest rates and loans to LKP Invest., Lane + Knorr + Plunkett Architects was unable to continue making cash rent payments to LKP Investment Company which in turn was unable to continue to make the mortgage payments. As a proximate cause, the long term Deed of Trust was declared in default and a sale at auction advertised for October 15, 1985.

6. The equity losses which will immediately occur are outlined as follows:

Principal balance (per default and sale notice, Exhibit"A"	1,084,000.00

Interest costs and attorneys fees (estimated)	150,000.00
Property value (per Exhibit"B" which I certify is a true and correct copy of a Letter of Opinion furnished by the appraiser	2,100,000.00+
Total Equity	$ 866,000.
Estimate value of Parcel 4. (Based on sale of $220,000 for south half Lot 12B, Block 112, Original Townsite of 4,000 s.f.)	400,000.
First Deed of Trust, Lot 3, Block 111	48,000.
Less payments owed, Lot 3, Block 111	3,600.
Equity for Lot 3, Block 111	348,000.
Total Equity, subject to immediate loss through sale	1,214,000.

7. A best-estimate of the long range losses which will accrue as a result of the loss of these properties is as follows: The estimated losses as a reult of the 600 Barrow foreclosure are through the loan

payoff date are

Depreciation loss(pre tax)	2,100,000.00
Cash flow loss	-600,000.00
Additional 6% equity increase per annumm due to scarcity and location(not escalation) (1995)	1,900,000.00
Principal payoff	1,084,000.00
Parking lot equity increase	400,000.00
Principal payoff	48,000.00
TOTAL	$6,132,000.00

After 600 Barrow mortage is paid off, the next 10 years show a much larger increase due to lack of mortgage payment. (1985) dollars)

Cash flow	3,000,000.00
Less costs, taxes,etc.	1,000,000.00
	2,000,000.00
Additional equity increase due to scarcity(6% per yr)	4,000,000.00
Less balloon payment at end of mortgage.(estimate)	(500,000.00)
Parking lot increase (additional)	400,000.00
TOTAL	$5,900,000.00

8. The total immediate and long range losses which will arise if the foreclosure takes place $13,246,000.00.

9. As a further consequence of the overcharged interest rates as outlined in the instant lawsuit, Michael Plunkett individually was required to sell property in Homer, AK for which the proceeds were used to pay Lane + Knorr + Plunkett partnership debts. Said debts arose at

least in part as a result of LKP Investments' inability to repay its obligtions to pay Lane + Knorr + Plunkett Architects and Planners in the form of reduced rent or rental offsets. Said inability was in turn proximately caused by the interest overcharge and default and sale of September 12, 1984. As Michael Plunkett was utilizing said sales to pay partnership debts, it was unable to make the remaining two property payments thereby causing a default of the unsubdivided property whose value is as follows:

Subdivided sale value	$150,000
Principal and interest balance of sale	36,000
Equity	$124,000
Less estimated subdivision costs	25,000
Equity	$100,000

As a proximate result of this loss, Michael Plunkett's ability to borrow funds to subdivide and/or sell the property even at a distress sale price.

10. Although LKP Investments, its partners, and guarantors were served with a copy of the recorded notice of default. Lane + Knorr + Plunkett Architects, its

agents or principals, lease tenant of commercial Unit 2 were never personally delivered or mailed by certified mail a separate copy of the recorded entice of default. A true and correct copy of the envelopes is attached as Exhibit "C".

11. Verification of the proposed supplemental and/or amended compplaint. I have drafted and read the proposed amended and/or supplemental complaint in the above entitled action and the same is true and correct to the best of my knowledge and belief.

12. I, through counsel for Don Knorr, Robert C. Schubert, Esq. have attempted to have First Interstate postpone the foreclosure until after the mandatory settlement conference is held in Anchorage Superior Court, Case 3AN-83-4318 Civil, but First Interstate Bank refuses until the instant case is dismissed with prejudice. The Settlement Conference was ordered on September 27, 1985. As a result, there was insufficient time to file the motion for preliminary injunction in time to allow responsive pleadings, a hearing and a decision prior to October 15, 1985, thus

necessisitating the Ex Parte Motion for Temporary Restraining Order since immediate irreparable injury, loss, and damage will result to affaint before the adverse parties on their attorneys can be heard in opposition.

13. As Pro Se litigant, pursuant to Rule of Federal Procedure 65(b), I hereby certify that the motion for preliminary injunction with attachments and supporting documents and/or Temporary Restraining Order have been served on counsel for First Interstate Bank of Alaska and to Lawyer's Title, Inc. The Motion for Leave to Amend pleadings with attachments and supporting documents has also been served on above mentioned counsel and Lawyer's Title, Inc. The requisite notice pursuant to local rules and rules of Federal procedure could not be met since:

(1) The decision to order a mandatory settlement conference was not made until September 27, 1985.

(2) Parties were attempting to negotiate a voluntary postponement of the sale up through the week ending October 4, 1985.

(3) It was not discovered until Wednesday, October 9, 1985 that AS.34.20.070(c)(3) and (4) had not been compliled with by defendant First Interstate Bank of Alaska, thereby, not allowing sufficient time before 15 October, 1985 sale date to file a motion with required time for responsive pleading. for the above reasons notice should not be required.

14. In April, 1985 a Federal Tax lien was filed at the Anchorage Recorder's Office against Roland H. Lane, Donald R. Knorr, and Michael E. Plunkett doing business as Lane + Knorr + Plunkett Architects and Planners. A true and correct copy of this Federal Tax lien is included as Exhibit D. Ruth Donadio of our office called Mr. Knight of the Internal Revenue Service. I heard from Ruth that Mr. Knight had not received a copy of the Notice of Default and sale scheduled for October 15, 1985. To the best of my knowledge and belief, the Internal Revenue Service was not mailed or personally delivered a copy of the Notice of Default and sale required by

AS.34.20.070(c)(4).

15. Attached as Exhibit E is a true and correct copy of the Notice of Default and election to sell scheduled for October 15, 1985 to Michael E. Plunkett.

16. Attached as Exhibit F is a true and correct copy of the Notice of Default and election to sell advertised in the Anchorage Daily News.

17. Attached as Exhibit G is a true and correct copy of the deed of Trust Note securing the property subject to the sale.

18. Attached as Exhibit H is a true and [illegible] of a loan agreement between Ray E. [illegible] which indicates a [illegible] the prime rate [illegible] Exhibit 2, Page 1, to the Complaint.

19. Should the sale go ahead on October 15, 1985, Lane + Knorr + Plunkett Investment Company will instantly become insolvent. Since the single largest definitive asset of Lane + Knorr + Plunkett Architects is the loan to LKP Investments, this insolvency of LKP Investments will immediately [illegible] Knor

Page 8, Affidavi[illegible]

insolvency of its individual partners who will be looked to cover the debts of the two partnerships or the partners will be unable to proceed with the instant litigation or any other litigation and will be unable to recover any damages. The cases will undoubtdly be dismissed for want of prosecution if nothing else. Thus the injury to plaintiffs will in fact be irreparable and irrecoverable if the sale is allowed to go forward.

20. Prior to the September, 1984 default sale, a Bruce McIntyre agreed to purchase one of the units subject to the sale. An earnest money agreement was filled out and given to McIntyre for signature. In the meantime, approval to postpone the foreclosure subject to the sale to McIntyre was agreed by Jerry Kurtz, First Interstate counsel. Just as approval to postpone foreclosure was obtained, McIntyre backed out prior to signing the earnest money agreement stateing the sale on their home in Missoula, Montana had fallen through. Subsequent phone calls to a realtor in Missoula indicated no such offer on the subject property had fallen through but

that in fact a contigency offer had been made and was still valid. Some time later I noticed in the Anchorage Recorder's office that Mr. and Mrs. Bruce McIntyre had a Deed of Trust from First Interstate Bank on a home in Huntington Park. That property had sold after notice of default to First Interstate Bank who had defaulted the developer Ray-Mar Builders. This sale had occurred in June, 1984.

21. Exhibit "I" to the Affidavit of Michael E. Plunkett is a copy of the First Amended Complaint in the referenced actions.

22. Michael E. Plunkett, Pro Se, and litigant hereby certifies that a Motion for Shortened Time is necessary for Motion for leave to Amend. The Complaint due to the fact that the violations of AK. Statutes regarding sale by trustee had been found on Wednesday, October 9, 1985 and to the extent that said pleadings must be amended prior to granting Temporary Restraining Order can be issued without amendment to the pleadings or until opposing counsel has time to respond to amend pleadings, said Motion for Shortened Time is not necessary.

FURTHER AFFIANT SAYETH NAUGHT.

Michael E. Plunkett, Pro Se .

SUBSCRIBED AND SWORN to before me this 11th day of October, 1985 at Anchorage, Alaska.

Notary Public in and for the State of Alaska. My Commission Expires: 12-18-88

Page 11

George E. Weiss, Attorney for Plaintiffs
P.O. Box 3130
Anchorage, Alaska 99510
(907) 274-2760

Michael E. Plunkett, pro se
600 Barrow Street, Suite 200
Anchorage, Alaska 99501
(907) 276- 4939

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Michael E. Plunkett; Lane + Knorr + Plunkett, Architects and Planners; Lane + Knorr + Plunkett Investment Company, also) known as LKP Investment Company; Michael Plunkett, Inc.; and all others similarly situated,

Plaintiffs,

v.

First Interstae Bank of Alaska, formerly Alaska Bank of Commerce; First Interstate Bank of Oregon, formerly, First National Bank of Oregon; Alaska Title Guaranty Agency, Inc.; and unknown Defendants, Does 1 through 35,

Defendants.

No. A84-387 Civil

Affidvit of Michael E. Plunkett 9/10/84

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

Michael E. Plunkett, being duly

sworn, deposes upon his oath and states:

1. that I am a Plaintiff in th above entitled action.

2. Verification of the Complaint. That I have read the Complaint in the above entitled action and the same is true to the best of my knowledge and belief.

3. That in regard to the property described is the Complaint, the Plaintiff's present alleged indebtedness is approximately $274,000 on both parcels.

4. That the present market value of the real property parcels is as follows:

a) 600 Barrow , Unit E $250,000

b) seacliff Terrace, Unit 5-A $108,000

Total value $350,000.00

5. That the Plaintiffs present equity in said real estate is thus:

a) Gross Equity in both units $84,000

b) less related expenses (taxes

homeowners dues, utilities, etc.) -$8,000 est.

Net equity $74,000.00

and that Plaintiffs stand to lose that equity and value, if the Defendants are permitted to proceed withthe foreclosure and sell the properties at a foreclosure sale.

8. That I presently have an fair offer and earnest money on the Seacliff Terrace property; but Defendant, First Interstate Bank of Alaska, has unreasonably refused to forestall and postpone the foreclosure sale to allow the prospective buyer to perfect a closing.

7. That I personally had no knowledge of the misrepresented interest rate until I read about the Oregon antitrust action in the newpaper this year; and that to the best of my knowledge and belief,none of the Plaintiffs had any such knowledge prior to my bringing it to their

attention.

8. that I involved in defending other alleged to be multimillion dollar litigation; and that I believe my cash shortfall, which occurred during the course of the payments at the floating rate on the loan to First Interstate Bank of Alaska (Bank of Commerce) to be a significant factor in liability attributed to Plaintiffs in that other litigation.

9. That a completed foreclosure and sale may serve to invite other creditors of Plaintiffs to unnecessarily push Plaintiffs into insolvency and related proceedings.

10. that at the time of the notice of default, Plaintiffs had been about $10,000in alleged arrears, a sum considerably less than the wrongful interest overcharges at the time.

FURTHER AFFIANT SAYETH NAUGHT.

Michael E. Plunkett /s/
Michael E. Plunket

Facsimile: Retyped from File Copy

Came before me one Michael E. Plunkett.known or proven to me to be the person described in the above instrument, and he subscribed to and swore to the truth of the same, all before me this __ day of ___ 198___.

_____
NOTARY PUBLIC IN AND FOR ALASKA
MY COMMISSION EXPIRES_____
(Notary Seal of George Weiss affixed)

Plunkett v. 1st Interstate Bank- Affidavit

§ 4. Impeachment. The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

§ 1. Judicial power; tenure of office. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

§ 2. Jurisdiction. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more states; — between a state and citizens of another state; — between citizens of different states; — between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.[7]

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

§ 3. Treason; proof and punishment. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

7. See 11th amendment.

ARTICLE IV.

§ 1. Full faith and credit among states. Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

§ 2. Privileges and immunities; fugitives. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of
be due.

§ 3. Admission of new states; power over territory and other property. New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or any particular state.

§ 4. Guarantee of republican form of government. The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V.

Amendment of the Constitution. The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendment to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures

of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE IV.

Debts; supremacy; oath. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The Senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious tests shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

Ratification and establishment. The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same.[8]

Done in Convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven and of the Independence of the United States of America the Twelfth. In Witness whereof we have hereunto subscribed our names.

AMENDMENTS TO THE CONSTITUTION.

ARTICLE I.

Freedom of religion, of speech and of the press. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[9]

ARTICLE II.

Right to keep and bear arms. A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.[10]

ARTICLE III.

Quartering of soldiers. No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.[11]

ARTICLE IV.

Searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[12]

ARTICLE V.

Rights of accused in criminal proceedings; due process; eminent domain. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor

shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[13]

ARTICLE VI.

Right to speedy trial, witnesses, etc. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[14]

ARTICLE VII.

Trial by jury in civil cases. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.[15]

ARTICLE VIII.

Bails, fines and punishments. Excessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[16]

ARTICLE IX.

Reservation of rights of the people. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[17]

Article X.

Powers reserved to states or people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.[18]

Article XI.

Restriction of judicial power. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.[19]

Article XII.

Election of President and Vice President. The electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. ... But if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The

person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President should be eligible to that of Vice President of the United States.[20]

ARTICLE XIII.

§ 1. Slavery abolished. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2. Enforcement. Congress shall have power to enforce this article by appropriate legislation.[21]

ARTICLE XIV.

§ 1. Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Apportionment of representatives in Congress. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such

state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3. Persons disqualified from holding office. No person shall be a Senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each house, remove such disability.

§ 4. What public debts are void. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. Power to enforce article. The Congress shall have power to enforce by appropriate legislation, the provisions of this article.[22]

ARTICLE XV.

§ 1. Right to vote not to be abridged. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

§ 2. Power to enforce article. The Congress shall have power to enforce this article by appropriate legislation.[23]

EXECUTIVE ORDER NO. 12022

Ex.Ord. No. 12022, Dec. 1, 1977, 42 F.R. 61441, as amended, formerly set out as a note under this section, which related to the National Commission for the Review of Antitrust Laws and Procedures, was revoked by Ex.Ord. No. 12258, Dec. 31, 1980, 46 F.R. 1251, set out as a note under section 14 of Title 5, Appendix I, Government Organization and Employees.

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708.)

Historical and Statutory Notes

1974 Amendment. Pub.L. 93-528 substituted "a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years" for "a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year".

Legislative History. For legislative history and purpose of Pub.L. 93-528, see 1974 U.S. Code Cong. and Adm. News, p. 6535.

Federal Practice and Procedure

Enforcement of patent procured by fraud as violative of this section, see Wright, Miller & Kane: Civil 2d § 2761.

Labor disputes within jurisdiction of federal courts, see Wright, Miller & Cooper: Jurisdiction 2d § 3581.

Obligation of party opposing summary judgment to present evidence, see Wright, Miller & Kane: Civil 2d § 2739.

Propriety of summary judgment in complicated and important litigation, see Wright, Miller & Kane: Civil 2d § 2732.1.

Federal Jury Practice and Instructions

Antitrust—conspiracy—contract in restraint of trade, see Devitt and Blackmar § 55.01 et seq.

Antitrust—"private" action for treble damages, see Devitt, Blackmar & Wolff: Civil § 90.01 et seq.

West's Federal Forms

Actions by apparent agents of defendants, see § 1596.5.

Answers, see § 2019.5.

Complaints—

Discriminatory prices affecting competition, see § 1601.3.

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§ 4. Jurisdiction of courts; duty of United States attorneys; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

§ 5. Bringing in additional parties

Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

July 2, 1890, c. 647, § 5, 26 Stat. 210.

§ 7. "Person" defined

The word "person", or "persons", wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

§ 12. Words defined

"Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Oct. 15, 1914, c. 323, § 1, 38 Stat. 730.

§ 13. Discrimination in price, services, or facilities—Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods,

wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Burden of rebutting prima-facie case of discrimination

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Payment or acceptance of commission, brokerage or other compensation

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Payment for services or facilities for processing or sale

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Furnishing services or facilities for processing, handling, etc.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Knowingly inducing or receiving discriminatory price

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Oct. 15, 1914, c. 323, § 2, 38 Stat. 730; June 19, 1936, c. 592, § 1, 49 Stat. 1526.

Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 15b. Limitation of actions

Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

Oct. 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 283.

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub.L. 91-375, § 6(j)(11), 84 Stat. 778.)

Historical and Revision Notes

Reviser's Note. 1948 Act. Based on Title 18, U.S.C., 1940 ed., § 338 (Mar. 4, 1909, c. 321, § 215, 35 Stat. 1130).

The obsolete argot of the underworld was deleted as suggested by Hon. Emerich B. Freed, United States district judge, in a paper read before the 1944 Judicial Conference for the sixth circuit in which he said:

"A brief reference to § 1341, which proposes to reenact the present section covering the use of the mails to defraud. This section is almost a page in length, is involved, and contains a great deal of superfluous language, including such terms as 'sawdust swindle, green articles, green coin, green goods and green cigars.' This section could be greatly simplified, and now-meaningless language eliminated."

The other surplusage was likewise eliminated and the section simplified without change of meaning.

A reference to causing to be placed any letter, etc. in any post office, or station thereof, etc. was omitted as unnecessary because of

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CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Sec.

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections [1] (a), (b), or (c) of this section.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.)

[1] So in original. Probably should be "subsection".

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.)

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 944.)

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause such action to be expedited in every way.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 944.)

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 944.)

Sec. 06.05.280. Bank fees and charges connected with mortgage loans. (a) A bank may require borrowers to pay only the necessary expenses incurred in connection with the making, closing, disbursing, extending, readjusting or renewing of mortgage loans, including, when appropriate, documented secretarial expenses, documented loan supervision expenses, appraisal, attorney, abstract, filing, recording and registration fees, title examinations, title insurances, mortgage insurances, credit reports, surveys, drawings of papers, escrow services, mortgage loan collection account services, and taxes or charges imposed upon or in connection with the making, recording or filing of a mortgage, deed of trust, or other security instrument intended to perfect a security interest related to the mortgage loan. A bank may also require borrowers to pay the cost of all other necessary and incidental services furnished by the bank or by others in connection with mortgage loans, including the costs of services of inspectors, engineers, architects or others reasonably required to evaluate or administer the mortgage loan. The charges by a bank may be collected by the bank from the borrower or added to the mortgage loan amount, and charges by a third party may be collected by the bank from the borrower and paid to the third party, or may be paid directly to the third party by the borrower.

(b) The fees and charges authorized by (a) of this section are in addition to the interest authorized by law, and are not a part of the interest collected or agreed to be paid on a mortgage loan within the meaning of any law of the state which limits the rate of interest. Any such fees and charges or possible fees and charges shall be disclosed and explained to the borrower in advance, in a manner that the department may direct.

(c) A director, officer, or employee of a bank may not receive a fee or other compensation of any kind in connection with obtaining a mortgage loan from a bank, except for services actually rendered as provided in this chapter. (§ 20 ch 169 SLA 1978)

Sec. 11.31.100. Attempt. (a) A person is guilty of an attempt to commit a crime if, with intent to commit a crime, the person engages in conduct which constitutes a substantial step toward the commission of that crime.

(b) In a prosecution under this section, it is not a defense that it was factually or legally impossible to commit the crime which was the object of the attempt if the conduct engaged in by the defendant would be a crime had the circumstances been as the defendant believed them to be.

(c) In a prosecution under this section, it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, prevented the commission of the attempted crime.

(d) An attempt is

(1) an unclassified felony if the crime attempted is murder in the first degree;

(2) a class A felony if the crime attempted is an unclassified felony other than murder in the first degree;

(3) a class B felony if the crime attempted is a class A felony;

(4) a class C felony if the crime attempted is a class B felony;

(5) a class A misdemeanor if the crime attempted is a class C felony;

(6) a class B misdemeanor if the crime attempted is a class A or class B misdemeanor.

(e) If the crime attempted is an unclassified crime described in a state law which is not part of this title and no provision for punishment of an attempt to commit the crime is specified, the punishment for the attempt is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the amount of the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime attempted is punishable by an indeterminate or life term, the attempt is a class A felony. (§ 2 ch 166 SLA 1978; am § 1 ch 102 SLA 1980; am § 10 ch 45 SLA 1982; am § 1 ch 59 SLA 1988)

Sec. 11.31.110. Solicitation. (a) A person commits the crime of solicitation if, with intent to cause another to engage in conduct constituting a crime, the person solicits the other to engage in that conduct.

(b) In a prosecution under this section,

(1) it is not a defense

(A) that the defendant belongs to a class of persons who by definition are legally incapable in an individual capacity of committing the crime that is the object of the solicitation; or

(B) that a person whom the defendant solicits could not be guilty of the crime that is the object of the solicitation;

(2) it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, after soliciting another person to engage in conduct constituting a crime, prevented the commission of the crime.

(c) Solicitation is a

(1) class A felony if the crime solicited is an unclassified felony;

(2) class B felony if the crime solicited is a class A felony;

(3) class C felony if the crime solicited is a class B felony;

(4) class A misdemeanor if the crime solicited is a class C felony;

(5) class B misdemeanor if the crime solicited is a class A or class B misdemeanor.

(d) If the crime solicited is an unclassified crime described in a state law which is not part of this title and no provision for punishment of a solicitation to commit the crime is specified, the punishment for the solicitation is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime solicited is punishable by an indeterminate or life term, the solicitation is a class A felony. (§ 2 ch 166 SLA 1978; am § 2 ch 102 SLA 1980; am § 11 ch 45 SLA 1982)

Sec. 11.41.520. Extortion. (a) A person commits the crime of extortion if the person obtains the property of another by threatening or suggesting that either that person or another may

(1) inflict physical injury on anyone, except under circumstances constituting robbery in any degree, or commit any other crime;

(2) accuse anyone of a crime;

(3) expose confidential information or a secret, whether true or false, tending to subject a person to hatred, contempt, or ridicule or to impair the person's credit or business repute;

(4) take or withhold action as a public servant or cause a public servant to take or withhold action;

(5) bring about or continue a strike, boycott, or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the person making the threat or suggestion purports to act;

(6) testify or provide information or withhold testimony or information with respect to a person's legal claim or defense; or

(7) inflict any other harm which would not benefit the person making the threat or suggestion.

(b) A threat or suggestion to perform any of the acts described in (a) of this section includes an offer to protect another from any harmful act when the offeror has no apparent means to provide the protection or when the price asked for rendering the protection service is grossly disproportionate to its cost to the offeror.

(c) It is a defense to a prosecution based on (a)(2), (3), or (4) of this section that the property obtained by threat of accusation, exposure, lawsuit, or other invocation of official action was honestly claimed as restitution or indemnification for harm done in the circumstances to which the accusation, exposure, lawsuit, or other official action relates, or as compensation for property or lawful services.

(d) Extortion is a class B felony. (§ 3 ch 166 SLA 1978)

Sec. 11.41.530. Coercion. (a) A person commits the crime of coercion if the person compels another to engage in conduct from which there is a legal right to abstain or abstain from conduct in which there is a legal right to engage, by means of instilling in the person who is compelled a fear that, if the demand is not complied with, the person who makes the demand or another may

(1) inflict physical injury on anyone, except under circumstances constituting robbery in any degree, or commit any other crime;

(2) accuse anyone of a crime;

(3) expose confidential information or a secret, whether true or false, tending to subject a person to hatred, contempt, or ridicule or to impair the person's credit or business repute;

(4) take or withhold action as a public servant or cause a public servant to take or withhold action;

(5) bring about or continue a strike, boycott, or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the person making the threat or suggestion purports to act;

(6) testify or provide information or withhold testimony or information with respect to a person's legal claim or defense.

(b) It is a defense to a prosecution under (a)(2), (3), or (4) of this section that the defendant reasonably believed that the accusation or exposure was true or that the lawsuit or other invocation of official action was justified and that the defendant's sole intent was to compel or induce the victim to take reasonable action to correct the wrong that is the subject of the accusation, exposure, lawsuit, or invocation of official action or to refrain from committing an offense.

(c) Coercion is a class C felony. (§ 3 ch 166 SLA 1978)

Sec. 12.55.125. Sentences of imprisonment for felonies. (a) A defendant convicted of murder in the first degree shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years.

(b) A defendant convicted of murder in the second degree, kidnapping, or misconduct involving a controlled substance in the first degree shall be sentenced to a definite term of imprisonment of at least five years but not more than 99 years.

(c) A defendant convicted of a class A felony may be sentenced to a definite term of imprisonment of not more than 20 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, five years;

(2) if the offense is a first felony conviction, other than for manslaughter, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, or knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, seven years;

(3) if the offense is a second felony conviction, 10 years;

(4) if the offense is a third felony conviction, 15 years.

(d) A defendant convicted of a class B felony may be sentenced to a definite term of imprisonment of not more than 10 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a second felony conviction, four years;

(2) if the offense is a third felony conviction, six years;

(3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, two years.

(e) A defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a second felony conviction, two years;

(2) if the offense is a third felony conviction, three years;

(3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed

or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, one year.

(f) If a defendant is sentenced under (a) or (b) of this section,

(1) imprisonment for the prescribed minimum term may not be suspended under AS 12.55.080;

(2) imposition of sentence may not be suspended under AS 12.55.085;

(3) imprisonment for the prescribed minimum term may not be otherwise reduced.

(g) If a defendant is sentenced under (c), (d)(1), (d)(2), (e)(1), (e)(2), or (i) of this section, except to the extent permitted under AS 12.55.155 — 12.55.175,

(1) imprisonment may not be suspended under AS 12.55.080;

(2) imposition of sentence may not be suspended under AS 12.55.085;

(3) terms of imprisonment may not be otherwise reduced.

(h) Nothing in this section or AS 12.55.135 limits the discretion of the sentencing judge except as specifically provided.

(i) A defendant convicted of sexual assault in the first degree or sexual abuse of a minor in the first degree may be sentenced to a definite term of imprisonment of not more than 30 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55 175:

Sec. 45.45.010. Legal rate of interest. (a) The rate of interest in the state is 10.5 percent a year and no more on money after it is due except as provided in (b) of this section.

(b) Interest may not be charged by express agreement of the parties in a contract or loan commitment that is more than five percentage points above the annual rate charged member banks for advances by the 12th Federal Reserve District on the day on which the contract or loan commitment is made. A contract or loan commitment in which the principal amount exceeds $25,000 is exempt from the limitation of this subsection.

(c) *[Repealed, § 3 ch 84 SLA 1973.]*

(d) *[Repealed, § 2 ch 94 SLA 1981.]*

(e) *[Repealed, § 4 ch 146 SLA 1974.]*

(f) A bank, credit union, savings and loan institution, pension fund, insurance company or mortgage company may not require or accept

any percent of ownership or profits above its interest rate. This subsection does not apply to a loan if the principal amount of the loan is $1,000,000 or more and the term of the loan is five years or more.

(g) Loan contracts and commitments covering one- to four-family dwellings may be prepaid without penalty, except federally insured loans that require a prepayment penalty.

(h) If the limitations on interest rates provided for in this section are inconsistent with the provisions of any other statute covering maximum interest, service charges or discount rates then the provisions of the other statute prevail. (§ 25-1-1 ACLA 1949; am § 20 ch 143 SLA 1968; am § 2 ch 69 SLA 1969; am §§ 1, 2 ch 94 SLA 1969; am §§ 1, 2 ch 239 SLA 1970; am §§ 1 — 3 ch 84 SLA 1973; am §§ 1 — 4 ch 146 SLA 1974; am § 1 ch 110 SLA 1976; am § 1 ch 159 SLA 1976; am § 2 ch 107 SLA 1980; am §§ 1, 2 ch 94 SLA 1981; am § 1 ch 56 SLA 1982)

Sec. 45.50.470. [Repealed, § 1 ch 246 SLA 1970.]

Sec. 45.50.471. Unlawful acts and practices. (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce are declared to be unlawful.

(b) The terms "unfair methods of competition" and "unfair or deceptive acts or practices" include, but are not limited to, the following acts:

(1) fraudulently conveying or transferring goods or services by representing them to be those of another;

(2) falsely representing or designating the geographic origin of goods or services;

(3) causing a likelihood of confusion or misunderstanding as to the source, sponsorship, or approval, or another person's affiliation, connection, or association with or certification of goods or services;

(4) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;

(5) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, secondhand, or seconds;

(6) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(7) disparaging the goods, services, or business of another by false or misleading representation of fact;

(8) advertising goods or services with intent not to sell them as advertised;

(9) advertising goods or services with intent not to supply reasonable expectable public demand, unless the advertisement prominently discloses a limitation of quantity;

(10) making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(11) engaging in any other conduct creating a likelihood of confusion or of misunderstanding and which misleads, deceives or damages a buyer or a competitor in connection with the sale or advertisement of goods or services;

(12) using or employing deception, fraud, false pretense, false promise, misrepresentation, or knowingly concealing, suppressing, or omitting a material fact with intent that others rely upon the concealment, suppression or omission in connection with the sale or advertisement of goods or services whether or not a person has in fact been misled, deceived or damaged;

(13) failing to deliver to the customer at the time of an installment sale of goods or services, a written order, contract, or receipt setting

out the name and address of the seller and the name and address of the organization that the seller represents, and all of the terms and conditions of the sale, including a description of the goods or services, which shall be stated in readable, clear, and unambiguous language;

(14) representing that an agreement confers or involves rights, remedies or obligations which it does not confer or involve, or which are prohibited by law;

(15) knowingly making false or misleading statements concerning the need for parts, replacement, or repair service;

(16) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;

(17) basing a charge for repair in whole or in part on a guaranty or warranty rather than on the actual value of the actual repairs made or work to be performed on the item without stating separately the charges for the work and the charge for the guaranty or warranty, if any;

(18) disconnecting, turning back or resetting the odometer of a vehicle to reduce the number of miles indicated;

(19) using a chain referral sales plan by inducing or attempting to induce a consumer to enter into a contract by offering a rebate, discount, commission, or other consideration, contingent upon the happening of a future event, on the condition that the consumer either

sells, or gives information or assistance for the purpose of leading to a sale by the seller of the same or related goods;

(20) selling or offering to sell a right of participation in a chain distributor scheme;

(21) selling, falsely representing or advertising meat, fish or poultry which has been frozen as fresh food;

(22) failing to comply with AS 45.02.350;

(23) failing to comply with AS 45.45.130 — 45.45.240;

(24) counseling, consulting or arranging for future services relating to the disposition of a body upon death whereby certain personal property, not including cemetery lots and markers, will be furnished or the professional services of a funeral director or embalmer will be furnished, unless the person receiving money or property deposits the money or property, and money or property is received, within five days of its receipt, in a trust in a financial institution whose deposits are insured by an instrumentality of the federal government designating the institution as the trustee as a separate trust in the name only of the person on whose behalf the arrangements are made with a provision that the money or property may only be applied to the purchase of designated merchandise or services and should the money or property deposited and any accrued interest not be used for the purposes intended on the death of the person on whose behalf the arrangements are made, all money or property in the trust shall become part of that person's estate; upon demand by the person on whose behalf the arrangements are made, all money or property in the trust including accrued interest, shall be paid to that person; this paragraph does not prohibit the charging of a separate fee for consultation, counseling or arrangement services if the fee is disclosed to the person making the arrangement; any arrangement under this paragraph which would constitute a contract of insurance under AS 21 is subject to the provisions of AS 21;

(25) failing to comply with the terms of the Alaska Gasoline Products Leasing Act (AS 45.50.800 — 45.50.850);

(26) failing to comply with AS 45.30 relating to mobile home warranties and mobile home parks;

(27) failing to comply with AS 14.48.060(b)(13);

(28) dealing in hearing aids and failing to comply with AS 08.55.

(c) The unlawful acts and practices listed in (b) of this section are in addition to and do not limit the types of unlawful acts and practices actionable at common law or under other state statutes.

(d) *[Repealed, § 21 ch 166 SLA 1978.]* (§ 2 ch 246 SLA 1970; am § 1 ch 53 SLA 1974; am § 1 ch 138 SLA 1974; am § 1 ch 183 SLA 1975; am § 2 ch 146 SLA 1976; am § 3 ch 197 SLA 1976; am § 3 ch 234 SLA 1976; am § 21 ch 166 SLA 1978; am § 5 ch 15 SLA 1986; am § 5 ch 64 SLA 1986; am § 12 ch 131 SLA 1986)

Sec. 45.50.481. Exemptions. Nothing in AS 45.50.471 — 45.50.561 applies to

(1) an act or transaction regulated under laws administered by the state, by a regulatory board or commission except as provided by AS 45.50.471(b)(27), or officer acting under statutory authority of the state or of the United States, unless the law regulating the act or transaction does not prohibit the practices declared unlawful in AS 45.50.471;

(2) an act done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement or did not have a direct financial interest in the sale or distribution of the advertised product or service;

(3) an act or transaction regulated under AS 21.36 or AS 06.05 or a regulation adopted under the authority of those chapters. (§ 2 ch 246 SLA 1970; am §§ 2, 3 ch 53 SLA 1974; am § 6 ch 64 SLA 1986)

Sec. 45.50.531. Private and class actions. (a) A person who purchases or leases goods or services and thereby suffers an ascertainable loss of money or property, real or personal, as a result of another person's act or practice declared unlawful by AS 45.50.471, may bring a civil action in the judicial district in which the seller or lessor resides or has the principal place of business or is doing business, to recover actual damages or $200, whichever is greater. The jury or, if the action is tried without a jury, the judge may, in cases of wilful violation, award up to three times the actual damages sustained, and in all cases the court may provide equitable relief it considers necessary or proper.

(b) A person entitled to bring an action under this section may, after investigation by and approval of the attorney general, if the unlawful act or practice has caused similar injury to numerous other persons similarly situated and if the person adequately represents the similarly situated persons, bring an action on behalf of the person and other similarly injured and situated persons to recover actual damages. A person planning to bring an action under this subsection shall first submit to the attorney general a copy of the proposed complaint, and the person may not file the complaint in court without the attorney general's approval. In an action brought under this subsection, the court may in its discretion order, in addition to damages, injunctive or other equitable relief.

(c) Upon commencement of an action brought under this section the clerk of the court shall mail a copy of the complaint or other initial pleading to the attorney general and, upon entry of an order or judgment in the action, shall mail a copy of the order or judgment to the attorney general.

(d) In an action brought by a person under this section, the court may award, in addition to the relief provided in this section, reasonable attorney fees and costs.

(e) A permanent injunction or final judgment against a person against whom an action was initiated under AS 45.50.501 is prima facie evidence in an action brought under this section that the person used or employed an act or practice declared unlawful by AS 45.50.471.

(f) A person may not commence an action under this section more than two years after the person discovers or reasonably should have discovered that the loss resulted from an act or practice declared unlawful by AS 45.50.471.

(g) If the court finds for the defendant in an action brought under this section, it may award the defendant an amount equal to the actual costs and attorney fees the defendant incurred in the defense.

(h) Manufacturers or suppliers of merchandise, the fault of which is the basis for the action under this chapter, are liable for the damages assessed to or suffered by retailers charged under this chapter. (§ 2 ch 246 SLA 1970; am § 1 ch 225 SLA 1976)

Sec. 45.50.542. Waiver. A waiver by a consumer of the provisions of AS 45.50.471 — 45.50.561 is contrary to public policy and is unenforceable and void. (§ 7 ch 53 SLA 1974)

Sec. 45.50.545. Interpretation. In interpreting AS 45.50.471 due consideration and great weight should be given the interpretations of 15 U.S.C. 45(a)(1) (§ 5(a)(1) of the Federal Trade Commission Act).

Sec. 45.50.551. Penalties. (a) A person who violates the terms of an injunction or restraining order issued under AS 45.50.501 shall forfeit and pay to the state a civil penalty of not more than $25,000 per violation. For the purposes of this section, the superior court in a judicial district issuing an injunction retains jurisdiction, and the cause shall be continued, and in these cases the attorney general acting in the name of the state may petition for recovery of the penalties.

(b) In an action brought under AS 45.50.501, if the court finds that a person is using or has used an act or practice declared unlawful by

AS 45.50.471, the attorney general, upon petition to the court, may recover, on behalf of the state, a civil penalty of not more than $5,000 per violation.

(c) *[Repealed, § 21 ch 166 SLA 1978.]* (§ 2 ch 246 SLA 1970; am § 9 ch 53 SLA 1974; am § 21 ch 166 SLA 1978)

Sec. 45.50.561. Definitions. In AS 45.50.471 — 45.50.561

(1) "advertising" includes the attempt directly or indirectly by publication, dissemination, solicitation, endorsement or circulation, display in any manner, including solicitation or dissemination by mail, telephone or door-to-door contacts, or in any other way, to induce directly or indirectly a person to enter or not enter into an obligation or acquire title or interest in any merchandise or to increase the consumption of it or to make a loan;

(2) "cemetery lot" means a lot, plot, space, grave, niche, mausoleum, crypt, vault or columbarium, used or intended to be used for the interment of human remains;

(3) "chain distributor scheme" means a sales device whereby a person, upon condition that the person make an investment, is granted a license or right to solicit or recruit for profit one or more additional persons who are also granted a license or right upon condition of making an investment and may further perpetuate the chain of persons who are granted a license or right upon the condition of investment; a limitation as to the number of persons who may participate, or the presence of additional conditions affecting eligibility for the license or right to solicit or recruit or the receipt of profit from these does not change the identity of the scheme as a chain distributor scheme; as used in this paragraph, "investment" means acquisition, for a consideration other than personal services, of tangible or intangible property, and includes but is not limited to franchises, business opportunities and services; "investment" does not include sales demonstration equipment and materials furnished at cost for use in making sales and not for resale;

(4) "consumer" means a person who seeks or acquires goods or services by lease or purchase;

(5) "dealing in hearing aids" has the meaning given in AS 08.55.200;

(6) "documentary material" means the original or a copy of a book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible docu-

ment or recording, wherever situate;

(7) "examination" of documentary material includes the inspection, study, or copying of the material, and the taking of testimony under oath or acknowledgment in respect of documentary material or copy of it;

(8) "fresh" means a condition of food which has never been frozen;

(9) "hearing aid" has the meaning given in AS 08.55.200;

(10) "knowingly" means actual awareness of the falsity or deception, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness;

(11) "seconds" means manufactured items having flaws or consisting of a standard quantity or quality less than the manufacturer's quality standard. (§ 2 ch 246 SLA 1970; am § 10 ch 53 SLA 1974; am § 2 ch 138 SLA 1974; am § 13 ch 107 SLA 1984; am § 13 ch 131 SLA 1986)

Sec. 45.50.562. Combinations in restraint of trade unlawful. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is unlawful. (§ 1 ch 53 SLA 1975)

Sec. 45.50.564. Monopolies and attempted monopolies unlawful. It is unlawful for a person to monopolize, or attempt to monopolize, or combine or conspire with another person to monopolize any part of trade or commerce. (§ 1 ch 53 SLA 1975)

Sec. 45.50.566. Transactions and agreements not to use or deal in commodities or services unlawful. It is unlawful for a person to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, or services, whether patented or unpatented, for use, consumption, enjoyment, or resale, or fix a price charged for it, or discount from, or rebate upon, that price, on the condition, agreement, or understanding that the lessee or purchaser will not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodity or service of a competitor or competitors of the lessor or seller, if the effect of the lease, sale or contract for sale, or of the condition, agreement, or understanding may be substantially to lessen competition or tend to create a monopoly in any line of commerce. (§ 1 ch 53 SLA 1975)

Sec. 45.50.572. Exemptions. (a) AS 45.50.562 — 45.50.596 do not forbid the existence or operation of labor, agricultural or horticultural organizations created for the purpose of mutual help, and not conducted for profit, or forbid or restrain members of those organizations from lawfully carrying out the legitimate objectives of them; nor are these organizations or members illegal combinations or conspiracies in restraint of trade under the provisions of AS 45.50.562 — 45.50.596.

(b) AS 45.50.562 — 45.50.596 do not forbid actions or arrangements authorized or regulated under the laws of the United States which exempt these actions or arrangements from application of the anti-

trust laws of the United States or under the following statutes of this state:

(1) AS 06.05.235;

(2) AS 10.15; and

(3) AS 31.05.110.

(c) AS 45.50.562 — 45.50.596 do not forbid persons engaged in the fishing industry as fishermen, catching or collecting aquatic products, from acting together in associations for the purpose of catching, collecting, or preparing for market their product.

(d) AS 45.50.562 — 45.50.596 do not apply to public utilities which have been issued a certificate of public convenience and necessity under AS 42.05.

(e) *[Repealed, § 68 ch 21 SLA 1985.]*

(f) *[Repealed, § 10 ch 75 SLA 1982.]*

(g) AS 45.50.562 — 45.50.596 do not forbid activities expressly required by a regulatory agency of the state. Activities permitted by a regulatory agency of the state are not forbidden by this chapter if the regulatory agency has given due consideration to the possible anticompetitive effects before permitting the activities, and enforcement of the provisions of AS 45.50.562 — 45.50.596 would be disruptive of the regulatory scheme.

(h) AS 45.50.562 — 45.50.596 do not forbid actions or arrangements necessary to carry out the provisions of the Alaska Native Claims Settlement Act. (§ 1 ch 53 SLA 1975: am § 10 ch 75 SLA 1982; am § 68 ch 21 SLA 1985)

Revisor's notes. — Formerly AS 45.52.060. Renumbered in 1980.

Effect of amendments. — The 1982 amendment repealed subsection (f), which read "AS 45.50.562 — 45.50.596 do not apply to banks and financial institutions regulated under AS 06."

The 1985 amendment repealed subsection (e), concerning the inapplicability of AS 45.50.562 — 45.50.596 to certain carriers and ferries.

Sec. 45.50.574. Contracts voidable. A contract or agreement in violation of a provision of AS 45.50.562 — 45.50.596 is voidable by either party as to future performance by either party; however, the court may, in its discretion, order payment for goods or services already received to prevent unjust enrichment. (§ 1 ch 53 SLA 1975)

Sec. 45.50.576. Suits by persons injured. (a) A person who is injured in business or property by a violation of AS 45.50.562 — 45.50.570, or a person so injured because the person refuses to accede to a proposal for an arrangement that, if consummated, would be a violation of AS 45.50.562 — 45.50.570, may bring a civil action

(1) for damages sustained by the person, and if the judgment is for the plaintiff and the trier of fact finds that the defendant's conduct was wilful, the plaintiff shall be awarded threefold the amount of damages sustained by the person, plus the costs of the suit, including reasonable attorney fees; and

(2) to enjoin the unlawful practice, and if judgment is for the plaintiff, the plaintiff may be awarded the costs of the suit, including reasonable attorney fees.

(b) When the state, a home rule or general law city or borough or other governmental entity is injured by reason of a violation of AS 45.50.562 — 45.50.570, it may maintain an action in the same manner as prescribed in (a) of this section for an injured person; and the state, city, borough, or other governmental entity is entitled to the same relief as provided in (a) of this section. (§ 1 ch 53 SLA 1975)

Revisor's notes. — Formerly AS 45.52.110. Renumbered in 1980.

Sec. 45.50.578. Certain violations constitute misdemeanor. A person who violates AS 45.50.562 or 45.50.564 is guilty of a misdemeanor and upon conviction is punishable, if a natural person, by a fine of not more than $20,000, or by imprisonment for not more than one year, or by both; and if not a natural person, by a fine of not more than $50,000. (§ 1 ch 53 SLA 1975)

Sec. 45.50.582. Jurisdiction of court. An action arising under AS 45.50.562 — 45.50.596 shall be brought in the superior court. (§ 1 ch 53 SLA 1975)

Sec. 45.50.588. Limitation of actions. An action to enforce a claim arising under AS 45.50.562 — 45.50.596 is barred unless commenced within four years after the claim accrues, except that when an action is brought by the attorney general under AS 45.50.562 — 45.50.596, the running of this period of limitation, with respect to every private right of action for damages which is based in whole or in part on a matter complained of in the action by the attorney general, shall be suspended during the pendency of the action brought by the attorney general. For the purpose of this section, a claim for a continuing violation is considered to accrue at any time during the period of the violation. (§ 1 ch 53 SLA 1975)

Sec. 45.50.596. Definitions. In AS 45.50.562 — 45.50.596

(1) "asset" includes any property, tangible or intangible, real, personal, or mixed and wherever located, and any other thing of value;

(2) "documentary evidence" includes an original or copy of a book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical tabulation, magnetic tape, or other computer data storage system, or other tangible document or recording;

(3) "trade" and "commerce" include but are not limited to, trade in goods, merchandise, natural resources, whether or not severed, extracted, harvested or produced, agricultural products, produce, choses in action, commodities, and any other article of commerce; they include trade or business in service trades, transportation, banking, lending, advertising, bonding and any other business whether or not that business furnishes a personal service. (§ 1 ch 53 SLA 1975)

Revisor's notes. — Formerly AS 45.52.300. Renumbered in 1980.

Rule 15. Amended and Supplemental Pleadings.

(a) AMENDMENTS. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing

the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided

by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) SUPPLEMENTAL PLEADINGS. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Rule 41. Dismissal of Actions.

(a) VOLUNTARY DISMISSAL: EFFECT THEREOF.

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who

has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and a. y dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) DISMISSAL OF COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) COSTS OF PREVIOUSLY-DISMISSED ACTION. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.

(a) MOTION FOR DIRECTED VERDICT: WHEN MADE; EFFECT. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court

may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) SAME: CONDITIONAL RULINGS ON GRANT OF MOTION.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) SAME: DENIAL OF MOTION. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Rule 56. Summary Judgment.

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so

specified shall be deemed established, and the trial shall be conducted accordingly.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

RULE 5
MOTIONS AND OTHER MATTERS

(A) Motions, etc., to be Served on Opposing Party. All motions, objections, orders to show cause, petitions, applications, and every other such matter shall be served upon all parties, or, after any party has appeared by counsel, upon counsel for such party.

(B) Requirements for Submission.

(1) There shall be served and filed as a part of the motion or other application:

(a) Legible copies of all documentary evidence which the moving party intends to submit in support of the motion or other application. When a motion is supported by affidavit, the affidavit shall be served with the motion unless otherwise ordered by the Court; and

(b) A clear, concise, complete and candid written statement of the reasons in support thereof, together with an adequate brief of the points and authorities upon which the moving party relies.

(2) Each party opposing a motion or other application shall, within fifteen (15) days of service of the motion or other application upon that party:

(a) Serve and file legible copies of all documentary evidence upon which the party intends to rely; and

(b) Serve and file a clear, concise, complete and candid written statement of the reasons in opposition thereto and an adequate opposing brief of points and authorities; or

(c) Serve and file a written statement of non-opposition to said motion.

The above will not be necessary if otherwise ordered by the Court or if otherwise stipulated in writing by the parties, such stipulation subject to the approval of the Court.

(3) If desired, the moving party within five (5) days after the service upon that party of the points and authorities of the adverse party, may serve and file a reply brief.

(4) Failure to file briefs within the time prescribed (or within any extension of time granted by order of the Court) shall subject such motions to summary ruling by the Court sua sponte. Failure to file a brief by the moving pary shall be

deemed an admission that, in the opinion of counsel, the motion is without merit. Failure to file a brief by the adverse party shall be deemed an admission that, in the opinion of counsel, the motion is well taken.

(C) Oral Argument.

(1) A written request for oral argument filed by counsel within three (3) days of the date of filing the final brief will constitute a certificate that oral argument is necessary. When request has been filed by one party, the right to oral argument, if granted, will extend to all parties. However, the Court, to expedite its business, may order the submission and determination of motions without oral hearing.

(2) When oral argument has been requested or granted by the Court and all briefs required by this rule have been filed with the Clerk, the Court, upon finding that oral argument is necessary, will schedule a hearing and notice all parties at least ten (10) days in advance of such hearing, or upon shorter notice as special or unusual circumstances may require.

(3) When oral argument is heard by the Court, counsel are required to present a meaningful and candid discussion and to avoid reading or restating material appearing in the briefs, records, or authorities. (Added, eff. 7-30-85)

(D) Motions Submitted. Unless one of the parties files a written request that oral argument be heard, a motion is deemed submitted for the Court's consideration when all briefs required by this rule have been filed with the Clerk, or the time for filing such briefs has passed. (Added, eff. 7-30-85)

(E) Discovery Motions.

(1) If the matter arises under the Federal Rules of Civil Procedure, Depositions and Discovery, Rules 26 through 37, inclusive, and if the matter is opposed, counsel shall prepare, serve and file a certificate that they have conferred with respect to the pending matter and enumerate therein the matters remaining for determination by the Court.

(a) The Court will not consider a motion, objection, order to show cause, petition or other similar matter arising under these cited rules until such certificate of compliance is filed.

(b) Counsel for the moving party shall arrange for such conferences.

(c) Should opposing counsel fail or refuse to confer with counsel for the moving party when requested to do so, this fact shall be reported promptly in writing to the Court.

(2) If the motion or other matter subsequently is heard and the Court finds the same (or the opposition thereto) to be without substantial justification, or that counsel for any party refused to meet and confer, or having met, refused or failed to confer in good faith, the Court may assess costs, including attorney's fees, if appropriate, against the offending party. (Added, eff. 7-30-85)

(F) Motions for Summary Judgment.

(1) A motion for summary judgment may be accompanied by affidavits setting forth concise statements of material facts made upon personal knowledge in support of the motion. With each such motion a brief must be served and filed asserting that the moving party is entitled to judgment as a matter of law.

(2) Any party opposing the motion shall simultaneously serve and file with the brief in opposition a "statement of genuine issues" setting forth clearly, concisely, completely and candidly those contested material facts which must be tried.

(3) Any party moving for summary judgment or opposing such motion shall comply with the provisions of paragraph (B) of this rule. (Amended, eff. 7-30-85)

(G) Motion for Shortened Time. The moving party may apply to the Court for an order shortening time, and serve such motion for shortened time upon all other parties to the action. The motion shall be accompanied by an affidavit which sets forth facts justifying shortened time. (Amended, eff. 7-30-85)

(H) Frivolous and Unnecessary Motions; Penalty. The presentation to the Court of frivolous or unnecessary motions or opposition to motions which, in the judgment of the Court, unduly delay the progress of the action or proceedings, or the filing of any motion to dimiss or motion to strike for the purpose of delay where no reasonable ground appears therefor, subjects counsel presenting or filing such to imposition of costs and attorney's fees. (Amended, eff. 7-30-85)

(I) Interlocutory Applications; Evidence. Upon the hearing of any application for an interlocutory or injunctive order, the facts shall be presented by affidavit or other documentary evidence; unless the Court upon application or upon its own

motion permits oral evidence to be introduced. (Amended, eff. 7-30-85)

(J) Motion for Rehearing or Reconsideration.

(1) A motion for rehearing or reconsideration shall be filed within ten (10) days of service of the order or ruling upon which rehearing or reconsideration is being requested.

(2) Any party moving for rehearing or reconsideration or opposing such motion shall comply with the provisions of paragraph (B) of this rule. (Added. eff. 9-14-83; amended eff. 7-30-85)

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Arizona District Court Local Rule 11(h)(now Rule 11(i)) (Source: Jacobson v. Filler, 790 F.2d 1362,1363-1364 (9th Cir.1986).) In Part:

" Any party filing a motion for summary judgment shall set forth separately from the memorandum of law, and in full, the specific facts on which he relies in support of his motion. The specific facts shall be set forth in serial fashion and not in narrative form. As to each fact, the statement shall refer to a specific portion of the record where the fact may be found (i.e. affidavit, deposition, etc.) Any party opposing a motion for summary judgment must comply with the foregoing in setting forth the specific facts, which the opposing party asserts, including those facts which establish a genuine issue of material fact precluding summary judgment in favor of the moving party."

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9th Circuit Court of Appeals Rules

Circuit Rule 35-1. Suggestion of Appropriateness of Rehearing En Banc.

Where a suggestion of the appropriateness of a rehearing en banc is made pursuant to FRAP 35(b) as a part of a petition for rehearing, a reference to susch suggestion, as well as to the petition for rehearing, shall appear on the cover of the combined petition and suggestion.

When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such a conflict is an appropriate ground for suggesting a rehearing en banc.

Circuit Advisory Committee Note to Circuit Rules 34-1 through 34-4 (in part)

" FRAP 34 and Circuit Rules 34-1 through 34-4 should be read in the context

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of the court's procedures which are set forth in this note. . . .

The random assignment of judges by computer to particular days or weeks on the calendars is intended to equalize the burden among them. The clerk soes not know what cases will ultimately be allocated to each of the panels.. . .

The only exception to the rule of random assignment of cases to panels is that a case heard by the court on a prior appeal may set before the same panel upon a later appeal. . . .

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(As amended Dec. 5, 1974, Pub.L. 93-512, § 1, 88 Stat. 1609; Nov. 6, 1978, Pub.L. 95-598, Title II, § 214(a), (b), 92 Stat. 2661; Nov. 19, 1988, Pub.L. 100-702, Title X, § 1007, 102 Stat. 4667.)